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Supreme Court, U.S.
FILED

081453 MAY 21 2009

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No.__

In The Supreme Court of the United States

TOMMY RAY ROLLINS, JR.,
Petitioner,
v.
UNITED STATES,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was prosecuted on federal weapons possession charges at the same time state authorities tried and convicted him for the same conduct (and other, related offenses). The federal court declared that its sentence would be "consecutive to" whatever sentence the state court, which had yet to sentence, would later impose.

The questions presented are:

1. Whether the statutory provision governing consecutive and concurrent sentencing in the federal courts, 18 U.S.C. § 3584, allows district courts to impose an anticipatory consecutive sentence.

2. If so, whether the decision to impose an anticipatory consecutive sentence is subject to the same rules – focused on the overlap between the conduct charged in the two prosecutions – that govern federal courts' sentencing of defendants already-sentenced in state courts.

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The court of appeals' opinion (App., *infra*, 1a-7a) is reported at 552 F.3d 739. The district court's ruling from the bench on sentencing (App., *infra*, 8a–12a) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 21, 2009. On April 9, 2009, Justice Alito extended the time within which to file this petition until May 21, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The language of the relevant portions of 18 U.S.C. § 3584 is quoted at p. 3, *infra*.
Sentencing Guideline § 5G1.3 is reproduced in the Appendix, at 16a.

STATEMENT

This case concerns the authority of a federal district to impose a sentence "consecutive to" an as-yet- unannounced state court sentence for the same criminal conduct.

A. Statutory Background

1. Before the 1984 Sentencing Reform Act, no federal statutory provision addressed federal courts' power to impose consecutive and concurrent sentences generally, or their

authority to take account of sentences imposed by state courts.

As both federal and state laws shifted in the direction of determinate, "real-time" and "real-offense" sentencing models, and as state and federal authorities made increased use of their historic powers to initiate dual prosecutions, see *United States* v. *Marigold*, 50 U.S. 560, 569 (1850), such questions took on greater salience – but yielded conflicting answers from the federal courts.[1] A number of cases, for example, held that federal courts were without authority to make their sentences concurrent to the defendant's state court sentence, see, *e.g.*, *United States* v. *Segal*, 549 F.2d 1293, 1301 (9th Cir. 1977), and the Second and Ninth Circuits disagreed whether pre-Act law allowed a federal court to impose

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[1]When state and federal authorities both prosecute, the sovereign that detained the individual first is deemed to have "primary jurisdiction" over him. See *Ponzi* v. *Fessenden*, 258 U.S. 254 (1922). In order that the defendant's appearances and trial in the second jurisdiction are not delayed, that jurisdiction "borrows" the defendant, issuing a writ of *habeas corpus ad prosequendum* to his custodian in the primary state. See *Carbo* v. *United States*, 364 U.S. 611 (1961). In cases where both trials result in convictions and terms of imprisonment, the defendant ordinarily serves the sentence imposed by primary jurisdiction first. See generally Goffete, *Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction*, 37 VAL. UNIV. L. REV. 1035, 156-57 (2003).

an anticipatory consecutive sentence. Compare *Salley* v. *United States*, 786 F.2d 546 (2d Cir. 1986) with *United States* v. *Eastman*, 758 F.2d 1315 (9th Cir. 1985); see generally Goffette, 37 VAL. UNIV. L. REV. at 1061-63.

2. Section 3584 of Title 18 was enacted as part of the landmark 1984 sentencing reform legislation. It first provides:

> **(a) Imposition of concurrent or consecutive terms.**--If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

Section 3584(b) directs that, in deciding whether to impose a concurrent or consecutive sentence, the district court must consider "the factors set forth" in 18 U.S.C. § 3553(a), *e.g.*, "the nature and circumstances of the offense and the history and characteristics of the defendant"; "the kinds of sentence" indicated

by the Sentencing Guidelines; and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," *id.* § 3553(a)(1),(3), (4). See also *Kimbrough* v. *United States*, 128 S. Ct. 558, 570 (2007) (highlighting Congress's "overarching" directive that federal sentences "'be sufficient, but not greater than necessary,'" to achieve purposes of punishment) (quoting 18 U.S.C. § 3553(a)).

3. Congress made clear that these new provisions were to apply to defendants who have been tried in both state and federal court. See *United States* v. *Fuentes*, 107 F.3d 1515, 1520 (11th Cir. 1997); *United States* v. *Gonzales*, 520 U.S. 1, 5-8 (1997) (rejecting argument that reference to "any term of imprisonment" in special provision prohibiting concurrent sentencing should be construed as applying only to federal sentences).

Indeed, one of the primary aims of the new provisions was to confirm federal courts' power to take account of state sanctions against the defendant. See *United States* v. *Hardesty*, 958 F.2d 910, 914 (describing § 3584 as "expressly grant[ing] federal judges the discretion to impose a sentence concurrent to a state prison term"), aff'd *en banc*, 977 F.2d 1347 (9th Cir. 1992). Decisions like *Segal*, Congress recognized – combined with dual sovereignty principles and increasingly rigid sentencing rules – heightened "the possibility that the

fortuity of two separate prosecutions will grossly increase a defendant's sentence," *United States* v. *Witte*, 515 U.S. 389, 405 (1995), and impeded the goal of reducing unwarranted sentencing disparities. See S. Rep. No. 98-225, at 126-27 & nn. 310, 314 (describing provisions as "intended to overrule *Segal* and similar cases").

4. To implement this regime, the United States Sentencing Commission promulgated Sentencing Guideline § 5G1.3, which, in broad terms consists of three instructions: § 5G1.3(a) directs that a federal sentence for a crime *committed* after the defendant was sentenced for another offense should be consecutive; § 5G1.3(b) states that a sentence "shall be imposed to run concurrently" to one for "another offense that is relevant conduct [see Guideline § 1B1.3(a)(1-3)] to the instant offense of conviction and that was the basis for an increase in the offense level for the instant offense"; while § 5G1.3(c), which applies to "any other case involving an undischarged term of imprisonment," directs the court to "to run [a sentence] concurrently, partially concurrently, or consecutively" so as to "achiev[e] a reasonable punishment for the instant offense."

As described by this Court,

> [Section] 5G1.3[(b)] * * * attempts to achieve some coordination of sentences imposed in * * * situations [where a defendant is prosecuted in more than one

> jurisdiction for the same criminal conduct], with an eye toward having such punishments approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time (i.e., had all of the offenses been prosecuted in a single proceeding).

Witte, 515 U.S. at 404; accord *Fuentes*, 107 F.3d at 1522 ("The purpose * * * is to provide one, uniform punishment for the same criminal activity").

B. Proceedings Below

1. On May 28, 2005, petitioner Tommy Rollins, Jr. drew a gun and opened fire on a Missouri state trooper who had pulled his car over for a routine traffic violation, and, having seriously wounded the trooper, drove away. Govt. C.A. Br. 5. About an hour later, Rollins entered a bar and told the patrons what he had done, asking that they call the police. *Ibid.* Upon being taken into custody, Rollins waived his *Miranda* rights and told police that when the trooper stopped him he had been on his way to the home of his former employer, a school principal named Dred Scott, whom he believed was harassing him. Rollins stated that he had planned to set fire to the principal's residence and to kill Scott and his family. *Id.* at 6. Rollins then led police to a wooded area where he had left a gun and two homemade Molotov cocktails he would have used to start the fire. *Ibid.*

2. One month later, a Missouri grand jury issued a four-count indictment, charging Rollins with (1) first degree assault on a law enforcement officer;[2] (2) armed criminal action (also for the attack on the trooper); (3) first-degree assault (for the contemplated attack on Scott and his family); and (4) unlawful possession of weapons. Docket entry (June 25, 2005).[3]

3. In November 2005, a federal grand jury indicted Rollins, charging him with a single count of possession of unregistered destructive devices (the Molotov cocktails), in violation of 26 U.S.C. §§ 5841, 5861(d). See also *id.* § 5871 (limiting sentence for that offense to a maximum of ten years' imprisonment).

Rollins appeared in federal court on November 22, 2005, on writ of *habeas corpus ad prosequendum* to the Jackson County Jail, and on April 29, 2006, he pleaded guilty to the federal charge. Rollins had not entered a plea agreement, App. 2a, and he was not sentenced by the federal court at the time.

4. In the ensuing months, Rollins's federal sentencing (and his state trial) were postponed

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[2]Missouri law punishes "attempt[ing] to kill or knowingly caus[ing] or attempt[ing] to cause serious physical injury to another person" as "first degree assault," See Mo. Rev. Stat. § 565.050.

[3]As used herein,"Docket entry" refers to the docket in the state proceedings against petitioner, No. 0516-CR03550-01 (Mo. 16th Jud. Cir.).

repeatedly, on account of his deteriorating mental health. In December 2006, the Missouri court found Rollins lacked the capacity to understand the proceedings against him or assist in his own defense and committed him to the custody of state mental health authorities. Docket entry (Dec. 4, 2006).

After undergoing extensive psychiatric treatment, Rollins was pronounced competent to stand trial on the state charges. In April 2008, a Missouri jury convicted him on all counts, and Rollins's state sentencing was scheduled for May 30, 2008.

5. On May 1, 2008, the district court convened a hearing to resolve sentencing and other outstanding issues in the federal case. Petitioner personally renewed, without success, a previously denied motion that his guilty plea be vacated, on the ground that he had not been "in a right frame of mind," when he entered it. Tr. 17-18.

The defense asked the district court to refrain from imposing its sentence until after the state court had imposed its (then scheduled for four weeks later). Tr. 9-14. Although not disputing that Eighth Circuit law permitted district courts to impose a sentence "consecutive to" an as-yet-imposed state sentence, see *United States* v. *Mayotte,* 249 F.3d 797, 799 (8th Cir. 2001), counsel explained that this way of proceeding would enable the federal court "to take whatever

those final sentences are into account before it imposes final sentence in this case," Tr. 14. He alternatively asked that the court make its sentence concurrent, highlighting the overlap between the federal offense (and various sentencing adjustments urged by the government) and the conduct on which the state court had convicted him, and disputed the Government's proposed calculation of his offense level under the Sentencing Guidelines. *Id.* at 45-47.

After hearing argument on these issues, the district court rejected Rollins's postponement request and sentenced him to the ten-year statutory maximum, directing that it be served consecutively to the impending, but still unannounced, state sentences.

On the question of the length of the sentence, the court generally rejected the prosecution's arguments that the actions involving the trooper should be treated as "relevant conduct" for purposes of calculating Rollins's offense level, App. 9a, but accepted its proposal to increase the level to reflect his intent to injure the Scotts. Because the Guidelines range so calculated was 135 to 168 months, *id.* at 10a, the court explained, the 120-month statutory maximum was reasonable.

On the question of a consecutive, as against concurrent, sentence, the district court recognized the overlap between the federal and state weapons possession convictions, but

explained that it "suppos[ed]" that the Missouri court would make Rollins's sentence on that charge *concurrent to* those it imposed for the two most serious felony charges. See also *id.* at 9a ("my supposition is that [those charges] * * * would not result in consecutive sentencing in state court"). The court also rejected Rollins's contention that § 5G3.1(b) supported concurrency on the ground that the conduct supporting the offense level increases was also the basis for the state court assault conviction, explaining that it would instead "operat[e] under [§] 5G3.1(c)" and attempt to arrive at a "reasonable punishment" *id.* at 10a.

6. On June 13, 2008, the state court sentenced Rollins, imposing two separate (but concurrent) life sentences for his actions against the trooper. The state court then imposed sentences of seven and 15 years, respectively, for the weapons-related charges and the intended attack on the Scotts. Contrary to the federal court's "supposition," however, the court directed that these sentences be served *consecutively* to those imposed for attacking the trooper. Docket entry (June 13, 2008).

7. On appeal, the Eighth Circuit, affirmed both the conviction and the district court's sentence.

The appeals court upheld the district court's authority to impose an anticipatory consecutive sentence, explaining that while

five other courts of appeals have held that Section 3584 does not permit federal courts to make sentences consecutive to ones state courts have not yet imposed, the Eighth Circuit and three other circuits had held to the contrary. App. 5a n.3.

The court then rejected Rollins's argument that the overlap between the conduct at issue in the state and federal proceedings warranted a concurrent, rather than a consecutive, sentence. Whether Guideline § 5G1.3(b) would call for a concurrent sentence on that basis, the Eighth Circuit ruled, was irrelevant because that Guideline only addresses the sentencing of defendants who are "subject to a term of imprisonment" when the federal court is announcing its sentence. See App. 4a-5a. A district court, the Eighth Circuit held, may impose a federal sentence consecutive to a not-yet-imposed state court sentence even when the convictions cover *identical* conduct. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents an opportunity to bring needed clarity to a practically important, complex, and constitutionally sensitive area of federal law.

As the decision below readily acknowledged, the courts of appeals remain sharply divided as to the basic ground rules governing sentencing in dual prosecution cases, and petitioner's case well illustrates the significance of this divergence: the consecutive

sentence imposed here would be impermissible in seven other circuits – five of which prohibit anticipatory consecutive sentences altogether and two others, which limit consecutive sentences to cases where one would be authorized for a similarly situated already-sentenced defendant.

Petitioner's case also well illustrates the dangers – and error – of each aspect of the Eighth Circuit's rule: because the district court was permitted to impose a consecutive sentence based on its "supposition" as to what the state court would do, petitioner was sentenced to a combined 17 years' imprisonment for conduct that the district court expected would result in ten years' total incarceration. Likewise, the Eighth Circuit regime, allowing consecutive sentencing in dual prosecutions when the conduct overlap is complete (but only when the federal court sentences first), collides with Congress's directives that federal sentences avoid disparities unrelated to the characteristics of the offense or the offender and be no more onerous than necessary to accomplishes the purposes of punishment.

Although cases like petitioner's arise frequently enough – and the Eighth Circuit's errors are consequential enough – to warrant intervention by this Court, there are other important reasons why the current, unsettled state of the law should not be tolerated. In addition to the unfairness and inequalities in

individual sentences the Eighth Circuit's system generates, uncertainty as to the basic ground rules infects the decisionmaking of prosecutors, defense counsel, judges, and prison authorities in both the federal and state systems – and induces needless conflict and friction between the two systems.

Indeed, to consider the various ad hoc "correctives" and "accommodations" the Government's previous submissions to this Court have identified – *e.g.*, that state courts may compensate for unauthorized federal sentences by shortening their own – only highlights the need for this Court to provide definitive guidance.

I. The Decision Below Conflicts With Governing Law In All But One Other Circuit

In upholding petitioner's consecutive sentence, the Eighth Circuit took the minority position on two distinct, but related, issues dividing the federal courts of appeals: five circuits have decided, in direct conflict with the decision below, that anticipatory consecutive sentencing is categorically impermissible, and two of the four circuits that *allow* such sentencing permit it only when the factual overlap between the prosecutions would not support a *concurrent* sentence for a defendant already sentenced in state court.

A. The Courts of Appeals Are Deeply Divided as to the Meaning of Section 3584

As the decision here – and those of six other circuits – have recognized, the courts of appeals are deeply splintered as to when, if ever, a district judge may make a defendant's federal sentence "consecutive" to one not yet imposed by a state court. See App. 5a n.3; *United States* v. *Donoso*, 521 F.3d 144, 147 (2d Cir. 2008) (per curiam); *United States* v. *Smith*, 472 F.3d 222, 226 (4th Cir. 2006); *United States* v. *Randolph*, 80 Fed. App'x 190, 193 (3rd Cir. 2003); *Romandine* v. *United States*, 206 F.3d 731, 738 (7th Cir. 2000); *United States* v. *Quintero*, 157 F.3d 1038, 1040-1041 (6th Cir. 1998); *United States* v. *Williams*, 46 F.3d 57, 59 (10th Cir. 1995); see also *McCarthy* v. *Doe*, 146 F.3d 118, 120 (2d Cir. 1998) ("The law governing prisoners subject to multiple sentences, particularly prisoners subject to multiple state and federal sentences, is hardly a model of clarity").

1. Decisions of the Second, Fourth, Sixth, and Ninth Circuits (and to a some extent, the Seventh Circuit, as well, see *infra*) have construed 18 U.S.C. § 3584 as forbidding anticipatory consecutive sentencing. See, *e.g.*, *Donoso*, 521 F.3d at 149; *Smith*, 472 F.3d at 227 (concerning a not-yet-imposed federal sentence, but recognizing that its construction would apply to not-yet-imposed state sentences); *Quintero*, 157 F.3d at 1039; *United States* v. *Clayton*, 927 F.2d 491, 493 (9th Cir. 1991).

In so holding, these courts have pointed both to the conceptual difficulty inherent in a sentence that is "consecutive" to one that does not "exist at the time the district court imposes its sentence," *Smith*, 472 F.3d at 226, and to the language and structure of the statute. The first sentence of § 3584(a), these courts have reasoned, is naturally understood as enumerating the *only* two circumstances in which a district court may properly impose a consecutive sentence: "[1]If multiple terms of imprisonment are imposed on a defendant at the same time or [2] if the defendant is *already* subject to an undischarged term of imprisonment." See *Smith*, 472 F.3d at 226; accord *Donoso*, 521 F.3d at 149.

This interpretation, these courts have reasoned, is reinforced by statutory structure and policy. Section 3584(b) directs courts making the consecutiveness/concurrency decision to consider the factors set forth in § 3553(a), and many of these entail determinations that can only meaningfully be made after the other court's sentence has been imposed and "the circumstances attending [that other] sentence" are known. *Smith*, 472 F.3d at 227.

Finally, these courts have observed, "[s]erious federalism concerns," *Smith*, 472 F.3d at 226 n.*, support their construction. Making a federal sentence consecutive to a future state one risks "preempt[ing] the right of the state to apply its own laws on

sentencing for violation of state criminal laws," *Clayton*, 927 F.2d at 493; while *denying* power to anticipate a state sentence helps reduce friction, by ensuring that "neither sovereign binds the sentencing discretion of the other," *ibid.*

2. Four Circuits have taken the opposite view of the statute's meaning. Like the decision below, the Fifth, Tenth and Eleventh Circuits have held that Section 3584 allows a district court to impose a sentence consecutive to the not-yet-imposed state sentence. See *United States* v. *Brown*, 920 F.2d 1212, 1216-1217 (5th Cir. 1991), overruled on other grounds, *United States* v. *Candia*, 454 F.3d 468, 473 (5th Cir. 2006); *United States* v. *Williams*, 46 F.3d 57, 59 (10th Cir. 1995); *United States* v. *Ballard*, 6 F.3d 1502, 1503 (11th Cir. 1993); but see *United States* v. *Lowe*, No. 08-2304 (8th Cir. Apr. 22, 2009) (granting rehearing *en banc* on this issue); see n.6, *infra*.

Disagreeing with decisions that have read the first sentence of § 3584(a) as a "prohibit[ion]" on anticipatory consecutive sentences, *Mayotte*, 249 F.3d at 799, these courts have (1) reasoned that "[n]either the statute nor the Guidelines directly address" the issue, *id.*, (2) construed the language of the provision's *last* sentence, which states that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently," as applying to cases like this

one, and (3) concluded that not to impose a consecutive sentence would thwart statutory policy. See, e.g., *Ballard*, 6 F.3d at 1506 (describing the statute as "empower[ing], even encourag[ing], district judges to give consecutive sentences"); accord *Williams*, 46 F.3d at 59.

Finally, these courts have disputed that considerations of federalism support a no-anticipatory-consecutive-sentencing construction. To the contrary, the Eleventh Circuit reasoned, principles of dual sovereignty make it reasonable for a federal court to require a defendant "to serve a *separate sentence* as punishment for his *federal crime*," *Ballard* 6 F.3d at 1510 (emphasis in original). When a consecutive sentence is imposed in this type of case, that court continued, the "entitle[ment]" of "each sovereign" "to have the defendant serve its respective sentence" is preserved, *id.*

3. Even this clear and widely acknowledged split does not capture the full extent of the disagreement among the courts of appeals. The Fifth Circuit has made its construction of Section 3584(a) dependent on whether the "anticipated but not-yet-imposed sentence is a federal sentence [or a state one]." *United States* v. *Quintana-Gomez*, 521 F.3d 495 (5th Cir. 2008). Having previously sustained district courts' authority to make their sentences consecutive to future *state court* ones, see, *e.g.*, *Brown*, that court recently held that, when the other court

is *federal,* "§ 3854 does not provide a district court authority to order that its sentence run consecutively to an anticipated but not-yet-imposed * * * sentence," 521 F.3d at 497. In so holding, however, the court did not identify any particular textual basis for this dual rule.[4]

Finally, the Seventh Circuit's leading decision on the subject, *Romandine* v. *United States*, 206 F.3d 731 (7th Cir. 2000), while agreeing with the Second, Fourth, Sixth, and Ninth Circuits that § 3584(a) does not "authorize[] a federal judge to *declare* that his sentence must run consecutively to some sentence that may be imposed in the future," *id.* at 737 (emphasis original), has nonetheless joined the Fifth, Eighth, Tenth, and Eleventh Circuits in reading the section's final sentence as providing independent ground for

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[4]Indeed, the opinion left little doubt that its conclusion was influenced by *criticism* of the court's earlier § 3584 decisions. *Quintana-Gomez* noted that an intervening Fifth Circuit decision had highlighted the inconsistency between *Brown* and the "'plain language of § 3584,'" *ibid.* (citing *United States* v. *Hernandez*, 234 F.3d 252, 256 (5th Cir. 2000)), and the opinion relied heavily on the reasoning of the Fourth Circuit – *i.e.*, that a consecutive sentencing decision cannot "'properly'" be made and the obligations imposed under § 3584(b) without knowing the terms of the other court's sentence, see 521 F.3d at 498 (quoting *Smith*, 472 F.3d at 227). The Fifth Circuit nonetheless recently denied a request that the full court reconsider its decision in *Brown*. See n. 6, *infra*.

consecutive sentences in dual prosecution cases. *Ibid.* (asserting that "the final sentence of § 3584(a) makes the federal sentence presumptively consecutive in all unprovided-for cases" and "disagree[ing] with the reasoning of *McCarthy* [146 F.3d at 121-22], to the extent the Second Circuit believes that the final sentence of § 3584(a) is limited to those situations also covered by the first sentence").[5]

B. The Courts That Agree With The Eighth Circuit On The Authority Question Are Further Split As To How Anticipatory Sentencing Decisions Should Be Made

Those circuits which *allow* district courts to order an anticipatory consecutive sentence are themselves divided as to how such authority is to be exercised. Rejecting petitioner's plea for a concurrent sentence, the court below held that fundamentally different rules apply to sentencing dually prosecuted defendants who have already been sentenced by a state court

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[5]The Seventh Circuit's distinctive thesis is that this language is directed at the Bureau of Prisons, and that since a federal court is without power to overcome the "presumption" (because the statute does not authorize anticipatory *concurrent* sentences), terms of imprisonment in cases like this will effectively run consecutively (although, that court further noted that state courts may achieve "practical" concurrency, by "discounting" their sentences). See 206 F.3d at 737-38.

and those, like Rollins, whose state sentence has not been imposed.

While in the former class of cases, Eighth Circuit precedent (and federal law generally) base the concurrent/consecutive decision almost entirely on the extent to which the conduct overlaps, see *Witte*, 515 U.S. at 505 (noting aim of "having [multiple] punishments approximate the total penalty that would have been imposed * * * in a single proceeding"); *United States* v. *Washington*, 17 F.3d 230, 234 (8th Cir. 1994) (remanding "with instructions to the district court to enter an order which ensures that [defendant] serves his federal sentence concurrently with his Missouri sentence, as is his entitlement"), the court below held, those considerations have no purchase in cases like Rollins's, where the defendant is not *already* subject to a state "'term of imprisonment'" at the time of federal sentencing. See App. 4a (citing Guideline § 5G1.3 and quoting 8 U.S.C. § 1101(a)(48)(B)).

The Fifth Circuit has long followed a similar approach. In *Brown*, that court refused to consider the overlap between the federal charges and (potential) state court proceedings involving the same conduct, reasoning that "§ 5G1.3 * * * deals with imposition of a sentence on a defendant already serving an unexpired term of imprisonment," 920 F.2d at 1216. See also *United States* v. *Boutte*, No. 08-40610, 2009 WL 742338 (5th Cir. Mar. 23,

2009) (non-precedential opinion), *6 ("Boutte has not established the applicability of this guideline, because he has not shown his not-yet-imposed sentence(s) to be 'undischarged' within the meaning of Guideline § 5G1.3(b)").

The governing rule in the two other Circuits that permit anticipatory sentences is altogether different. For example, in *United States* v. *McDaniel*, 338 F.3d 1287 (11th Cir. 2003) (per curiam), the Eleventh Circuit vacated the defendant's sentence, explaining that the district court had power to impose an anticipatory concurrent sentence – and indicating that its § 3584 decision should attempt to approximate what would have happened "if, at the time of [the defendant's] federal sentencing, he had already been sentenced in state court," *i.e.*, "his federal sentence would fall under the provisions of U.S.S.G. § 5G1.3 (b) or ©, which would mandate or at least allow for concurrent sentencing." 338 F.3d at 1287.

Similarly, in its (non-precedential) opinion in *United States* v. *Floyd*, 80 Fed. App'x 87, 89 (10th Cir. 2003), the Tenth Circuit sustained a district court decision to make the defendant's "federal sentence * * * run consecutively to an unimposed, future state sentence," *id.* at 87-88, but only after examining whether a "federal enhancement fully accounted for the conduct involved in the pending state trial." It recognized that in such

cases, the defendant's sentence would be "requir[ed to] * * * run concurrently under U.S.S.G. § 5G1.3(b)." *Id.* at 89-90. See *ibid.* (noting that "the province of the guideline is to 'ensure that no defendant is punished twice for the same crime.'") (quoting *United States* v. *Hurlich*, 293 F.3d 1223, 1229 (10th Cir.2002)).

* * *

As the foregoing attests, the rules governing sentencing of "defendant[s] * * * under the primary custodial jurisdiction of state authorities * * * * is probably the single most confusing and least understood" subject in federal sentencing law. Regional Counsel's Memo, Fed. Bur. of Prisons, Memo: Interaction of Federal and State Sentences When the Federal Defendant Is under State Primary Jurisdiction" (Oct. 11, 2006) at 1, http://www.bop.gov/news/ifss.pdf. The federal courts of appeals not only remain sharply divided as to the meaning of the central statutory provision, but they have so far settled on four entirely different rules for sentencing dually prosecuted defendants who have not been sentenced by the other court: (1) in four Circuits, anticipatory consecutive sentences are categorically prohibited; (2) in one, they are prohibited in federal-federal cases (but permitted in state-federal ones); (3) in two others, they are prohibited in cases where § 5G1.3 would support a concurrent

sentence; and (4) in the Fifth and Eighth Circuits such sentences are within the essentially plenary discretion of district courts (at least in federal state cases).[6]

II. The Rule Announced Below Is Seriously Wrong

Review is especially warranted because the rule applied below, which authorizes anticipatory consecutive sentences even when a *concurrent* sentence would have been imposed had the same defendant already been sentenced in state court, is entirely incompatible with the text, structure, and purposes of the Sentencing Reform Act and raises serious (and needless) fairness and federalism problems.

A. The Eighth Circuit's Interpretation of 18 U.S.C. § 3584(a) Is Incorrect

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[6]The Eighth Circuit's recent grant of *en banc* review in *United States* v. *Lowe* – over the Government's opposition— does not significantly affect, let alone obviate, the need for this Court's intervention. Even a reversal in that case would have no effect on the three other courts that permit anticipatory consecutive sentences; indeed, the Fifth Circuit very recently denied *en banc* review on the issue. See Order, *United States* v. *Garcia-Espinoza,* No. 08-10775 (Apr. 13, 2009). And if *Lowe* is affirmed en banc, the Eighth Circuit's erroneous ruling on the second question presented here will remain binding precedent. And a reversal in *Lowe* will not (absent this Court's intervention) avail petitioner, whose case was litigated when the Government still adhered to what it has since conceded to be an erroneous reading of the statute. See n.7, *infra.*

As the majority of Courts of Appeals have recognized – and the Government has recently come to accept – the text and structure of the Sentencing Reform Act do not permit district courts to impose the kind of anticipatory consecutive sentence at issue here. See, *e.g.*, Br. in Opp., *Hayes* v. *United States*, No. 08-7215 at 11 (cert. denied Apr. 17, 2009) ("contrary to the precedent of the [Eighth Circuit], Section 3584(a) does not give the district court the authority to impose" an anticipatory consecutive sentence).[7]

The language of Section 3584(a) itself argues overwhelmingly against the minority

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[7]Accord Br. in Opp. *DeLeon* v. *United States*, No. 08-6055, at 6 (cert. denied Feb. 23, 2009) ("In the government's view, contrary to the current position of the [Fifth Circuit], Section 3584(a) does not confer" discretion to impose a sentence "consecutively to a yet-to-be-imposed state sentence").

In its (August 2008) appellate brief in this case, however, the Government maintained that "the district court had discretion to impose a federal sentence * * * consecutively to * * * Rollins'[s] unimposed, future state sentence," and argued that the language of § 3584 supported a consecutive sentence. See C.A. Br. 24. Accordingly, even if the issues presented were not ones warranting plenary review, these circumstances, particularly the Government's subsequent concession of error on the outcome-determinative legal question, would warrant granting the petition, vacating the judgment below, and remanding the case. See, *e.g.*, *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996).

construction. The ordinary import of stating that "terms *may* run * * * consecutively" "[1] *if* multiple terms of imprisonment are imposed on a defendant at the same time, *or* [2] *if* a term of imprisonment is imposed on a defendant who is *already* subject to an undischarged term of imprisonment," 18 U.S.C. § 3584(a) (emphasis added), is to preclude a "consecutive" sentence where neither of those predicates is present. See *Donoso*, 521 F.3d at 149; accord *Smith*, 472 F.3d at 225; *Quintero*, 157 F.3d at 1039-1040. Indeed, this central, operative language (not to mention its repetition of the word "if" and inclusion of "already") would be surplusage if some other source conferred a general power to impose consecutive sentences, including in "all" cases, *Romandine*, 206 F.3d at 738, that *do not* satisfy the enumerated conditions.

As courts recognized even before the Sentencing Reform Act took effect, moreover, there are both conceptual and practical difficulties with a court's making its sentence "consecutive" to one that does not yet exist. As Judge Newman observed in *Salley*, a proper consecutive sentencing determination "requires * * * awareness of [the] sentence already imposed," because "[t]he length of a primary sentence is always relevant to a reasoned decision concerning both the length of a consecutive sentence and the choice of imposing it consecutively," 786 F.2d at 548 (Newman, J., concurring). As noted above, the

district court here could not have known how the Missouri court would punish Rollins for his state weapons possession conviction; it nonetheless based its decision on its "supposition," later proven erroneous, that the state court would "subsume" that sentence within those imposed for assaulting the trooper. Cf. *Salley,* 756 F.2d at 548 (Newman, J.) (observing that "[w]hen the District Judge in this case decided to impose the 57 months consecutively, he had no idea of the length of the New York sentence to which those 57 months would be consecutive").

These common sense apprehensions were given the force of law by Congress in 1984. Section 3584(b) *requires* federal courts deciding whether to impose a consecutive sentence, to "consider, as to each offense * * * the factors set forth in section 3553(a)." And as the Government has acknowledged (though not in any filing in this case), "[s]everal of the Section 3553(a) factors contemplate consideration of the total length of incarceration * * * [and such an] analysis cannot logically take place when one of the defendant's sentences has not yet been determined," *Hayes* Opp. 13-14.

Nor, contrary to the views of a number of courts, does the last sentence of § 3584 and its "presumption" in favor of consecutive sentences when "[m]ultiple terms of imprisonment [are] imposed at different times" support the authority upheld in this

case. First, that language need not be read as a grant of free-standing authority. Indeed, it is more naturally read as referring to the already-"[]provided cases." See *McCarthy*, 146 F.3d at 121; see also Goffette, VAL. L. REV. at 1076. To read it otherwise, in fact, would "render * * * the limiting conditions [appearing in the earlier sentence of the same provision] surplusage," Br. in Opp., *DeLeon v. United States*, No. 08-6055 at 11.

Second, the assumption that the "different times" language refers to circumstances like those here is highly problematic. As Congress was aware, *every* dual prosecution involves sentences imposed at different times. See *Ponzi*, 258 U.S. at 260 ("One accused of crime, of course, cannot be in two places at the same time"). But a central aim of the provision was to confirm federal courts' power to make their sentences *concurrent to* state ones, see pp. 4-5, *supra*, and Congress viewed sentences arising from multiple prosecutions for a single course of conduct as paradigmatic candidates for concurrency. See S. Rep. No. 225, 98th Cong 2d Sess. at 128 ("similar offenses committed in the course of a single criminal episode would ordinarily be appropriate subjects for concurrent sentences").

Third, to interpret "different times" to mean "now *and in the future*," is to federal give courts a vast and improbable kind of power. It is not clear what temporal limits, if any, would restrain federal courts' prospective sentencing

power: although petitioner here had been convicted in state court at the time of federal sentencing, the defendant in *Ballard* had not been tried yet, 6 F.3d at 1506, and the defendant in *Brown* had yet even to face state charges, see 920 F.2d at 1216. Cf. *Gonzales*, 520 U.S. at 13 (Stevens., J., dissenting) (noting government's agreement that provision barring concurrent sentences could not "reasonably be interpreted" as reaching later-imposed sentences); *Salley*, 758 F.2d at 548 (Newman, J.) ("a sentence to commence after the expiration of a sentence not yet imposed violates the principle that sentences must be definite and unambiguous").

Fourth, leaving federalism aside, the Eighth Circuit's construction places two *federal* courts with jurisdiction over a defendant on a collision course: both the first- and the second-sentencing courts would have authority to decide whether the same two sentences should be concurrent or consecutive. But see, *e.g.*, *United States* v. *Merrifield*, 755 F.2d 895, 896 (11th Cir. 1985) (per curiam) (anticipatory concurrent sentence would impermissibly enable "a federal judge in one district [to] * * * unilaterally limit the sentencing power of * * * a federal judge, acting in a separate case, of another district"); *Quintana-Gomez*, 521 F.3d at 498.

Finally, "serious federalism concerns," *Smith*, 472 F.3d at 226 n.*, may not be left aside. See *United States* v. *Bass*, 404 U.S. 336

(1971) (statutes should be construed with regard for "the sensitive relation between federal and state criminal jurisdictions"); *Oregon* v. *Ice*, 129 S. Ct. 711, 717 (2009) (describing as "beyond question [that] the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status"). As a number of courts have recognized, anticipatory consecutive sentencing precipitates conflict and friction between state and federal courts: many States have enacted laws preferring concurrent sentencing generally, sentences, and a number have provided expressly for concurrent state and federal sentencing, and both those laws and the policies they express can be rendered ineffective when a federal court preemptively declares that any sentence the state imposes will be consecutive. See *Mayotte*, 249 F.3d at 798-99 (sustaining anticipatory consecutive sentence, though state court announced concurrent one, noting that "to the extent that the federal and state sentences conflict * * * the federal sentence controls").[8]

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[8]The precise legal effect of such declarations is itself the subject of substantial debate. While *Mayotte*, declared that the federal court's decision "controls," in cases of conflict, the Fifth and Eleventh Circuits have said precisely the opposite, see *Quintana-Gomez*, 521 F.3d at 497 (state court in *Brown* was not "legally bound by the federal court's order"); *United States* v. *Andrews*, 330 F.3d 1305, 1307 n.1 (11th Cir. 2003)

Whether or not such federal court action is "preemptive" in the Supremacy Clause sense, however, it is surely *peremptory*. By exercising what, by tradition and common sense, is the prerogative of the second-sentencing court, the federal court shows scant "respect for state functions," *Younger* v. *Harris*, 401 U.S. 37, 44 (1971), and it puts the state court to the choice of applying its own law and thereby precipitating conflict or acquiescing. *Smith*, 472 F.3d at 227 (anticipatory sentence presents the second judge "with the Hobson's choice of either ignoring his own judgment or disobeying the order of [a federal court]"). Such treatment is especially inappropriate where the federal court is the *secondary* jurisdiction – especially where, as is often the case, the federal interests being vindicated in the district court (here, the weapons registration requirements of Title 26) are less weighty than those in the state proceedings.[9]

("We fully recognize that the Supremacy Clause does not permit federal courts to control how a state court sentences a defendant"). And numerous decisions – and the Government's briefs – have declared that, in cases of conflict, the federal Bureau of Prisons, not either court, is the decision maker. See, *e.g.*, *Romandine*, 206 F.3d at 738. But, as noted below, see p. 41, *infra*, how that agency makes such decisions (and how it lawfully should) are themselves the subject of uncertainty and disagreement.

[9]These decisions highlight the special error of the *Fifth Circuit's* rule. As noted above, that court made no

B. The Act Does Not Permit Distinctive, Unfavorable Treatment of Unsentenced Dually Prosecuted Defendants

Even if the text and structure of § 3584 did not prohibit anticipatory consecutive sentencing, however, the peculiar regime sanctioned by the decision below would still violate fundamental principles laid down in the Act and underscored in this Court's federal sentencing law decisions.

Even viewed solely as a matter of textual interpretation, the Eighth Circuit's rule and its rationale are passing strange: Having declined to read *the statute*'s "already subject to an undischarged term of imprisonment" language as announcing a limit on the authority to impose a consecutive sentence,

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effort to anchor its distinction between federal-federal and state-federal cases in the text of § 3584; but it is even more striking that the Fifth Circuit rule gives federal district judges *greater* authority in cases that implicate the interests of another sovereign.

Notably, the question whether a court should be permitted to impose an anticipatory *concurrent* sentence is likely a closer one. While the language of § 3584(a) suggests that consecutive and concurrent sentencing authority are coextensive, the structural, policy, and federalism considerations that argue against consecutive sentences do not operate the same way. The § 3584(b) requirement, for example, poses no obstacle, because, *inter alia*, a court that determines a *concurrent* sentence is appropriate does not need to know the length of the other court's sentence in order to decide its own.

the Eighth Circuit, inexplicably, treated nearly identical language in the Guideline – referring to "a defendant subject to an undischarged term of imprisonment" (*i.e.*, minus the "already") – as conclusive. See *Barnhart* v. *Walton*, 535 U.S. 212, 221 (2002) (declining to "interpret the same statutory words differently in closely related contexts").[10]

The court of appeals gave no reason why Congress (or the Sentencing Commission) would have intended two different rules – indeed, opposite ones – to govern consecutive sentencing of defendants convicted *and sentenced* in state court and those, like petitioner, federally sentenced while awaiting state court action. And the rule is all the more striking because the central focus of inquiry under the Guideline – the timing and extent of overlap between the conduct giving rise to the two charges – unlike some factors

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[10]The Eighth Circuit's attempt to bolster its rule with a reference to the 8 U.S.C. § 1101(a)(48)(B) definition is conspicuously unsuccessful. Not only does the phrase "term of imprisonment" *also* appear in the consecutive sentencing *statute*, but the cited definition is legally operative only in the "chapter" in which it appears, *i.e.*, the Immigration and Nationality chapter of Title 8, see *id.* § 1101(a) ("as used in this chapter * * *") and its function in that setting is to provide a rule for determining whether certain kinds of sanctions count as prison terms, for purposes of provisions that limit the immigration law rights of aliens with prison terms of a certain length. See, *e.g.*, *id.* § 1101(a)(43)(F) (defining "aggravated felony").

that courts are already directed to consider under § 3584(b), see pp. 25-26, *supra*, *can be* ascertained before the state sentence is pronounced. And there is something at least curious, if not affirmatively perverse, about a regime that directs courts to disregard information (*i.e.*, the conduct overlap) ordinarily relevant to the consecutiveness determination in a class of cases a defining feature of which is the unavailability of *other* pertinent information (*e.g.*, the character and length of the sentence imposed in the first court).

The Eighth Circuit's rule offends two central directives of the Sentencing Reform Act: that unwarranted disparities be avoided, and that federal sentences be "sufficient, but not greater than necessary" to accomplish the purposes of punishment. There is no question that a dually prosecuted defendant with the same criminal history as petitioner who committed the same offense as Rollins would, in the Eighth Circuit (as elsewhere) almost certainly receive a *concurrent* sentence, if the state court sentenced first. See, *e.g.*, *United States* v. *Washington*, 17 F.3d 230, 234 (8th Cir. 1994); *United States* v. *Kiefer*, 20 F.3d 874 (8th Cir. 1994). Moreover, that decision would be based on the extent of overlap between the conduct underlying the state charge and the grounds of conviction (and enhancement) in federal court, and not, for example, the length of the sentence the state court had imposed.

Moreover, because a ten-year (concurrent) sentence would concededly be "sufficient" in an instance where the state court sentenced first, a *consecutive* sentence, resulting in 17 years' total confinement for the same offender and offense, is, at least presumptively "greater than necessary" to achieve the objectives of federal sentencing law. See 18 U.S.C. § 3584(b) (requiring that district courts consider § 3553 factors).

But the principles that § 5G3.1 effectuates make clear that it is not "just another" Guideline. They concern a subject that is "[f]or many defendants * * * more important than a jury verdict of innocence on any single count," *Ice*, 129 S. Ct. at 721 (Scalia, J., dissenting); and, in addition to advancing Congress's general policies of parsimony and even-handedness, they protect values that opinions of this Court have recognized to have constitutional stature. See *Witte*, 515 U.S. at 405 (describing § 5G1.3(b) as a "[s]ignificant safeguard[] * * * against having the length of [a] sentence multiplied by duplicative consideration of the same criminal conduct").

The "possibility" adverted to by this Court in *Witte* – "that the fortuity of two separate prosecutions will grossly increase a defendant's sentence" has come to pass in this case. The punishment petitioner received is not one that Congress authorized or intended, cf. 26 U.S.C. § 5871. And this "gross[] increase" is a consequence not merely of the

"fortuity of separate prosecutions," 515 U.S. at 405, but of the further "fortuity" of the timing of the announcement of sentences – and of the Eighth Circuit's strange and mistaken legal rule.

III. The Questions Dividing The Lower Courts Are Highly Important

In a series of submissions to this Court, the Government has acknowledged both the existence and magnitude of the conflict among the courts of appeals, see, *e.g.*, Br. in Opp. in *Martinez-Guerrero* v. *United States*, No. 07-1362, at 4, and it is no longer willing to defend the merits of the statutory interpretation advanced (and relied upon by the court) below. See p. 21, *supra*, & n.7. But, echoing the Seventh Circuit's opinion in *Romandine*, the Government has contended that these conflicts and acknowledged errors are not important enough to warrant intervention by this Court. See 206 F.3d at 738 (asserting that these issues "do not matter, and the conflict is illusory").

This is exceedingly strange. As petitioner's case illustrates, the consequences of this division are anything but "illusory." Had a district court in the Second, Fourth, Sixth, or Ninth Circuit imposed a consecutive sentence under these circumstances, those courts would have vacated the whole sentence as invalid under § 3584. Had the federal prosecution occurred in the Tenth or Eleventh Circuits, those courts would have vacated the sentence

with instructions to follow the Sentencing Guidelines and impose a concurrent sentence instead. The 17 years of incarceration facing petitioner is nearly double what an identically situated offender in those jurisdictions would likely receive; it exceeds the total the district court "suppos[ed]" would result; it exceeds what an identically-situated defendant in the Eighth Circuit would receive if the state court had spoken two months earlier; and it exceeds by seven years the statutory maximum Congress specified for the federal offense.

Under any circumstances, divergent interpretations of federal law yielding such consequential disparities call out for this Court's review. Such stark disparities are especially intolerable when, as here, they arise in interpreting a statute whose animating purpose was to promote uniform treatment of similarly-situated individuals; when, as here, they often lead to sentences far longer than the maximum Congress thought appropriate; and, when, as here, the government itself concedes that one side of the circuit split is simply wrong.

These troubling conflicts potentially arise, moreover, in nearly every case in which charges can be brought in both state and federal court. This is an already large and ever-faster growing category of cases. Federal and state criminal law now overlap to an extent unimaginable even a half century ago. See John S. Baker, Jr., *State Police Powers and*

the Federalization of Local Crime, 72 Temp. L. Rev. 673, 678 (1999) ("In 1997, less than 5% of federal prosecutions involved federal statutes that do not duplicate state statutes"); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 Annals Am. Acad. Pol. & Sci. 39, 40 (1996) (describing historically limited reach of federal criminal law). And questions of concurrent and consecutive sentencing have taken on more importance in regimes where courts, rather than parole authorities, have a primary role in determining the actual duration of a defendant's incarceration. See *Ice*, 129 S. Ct. at 721 (Scalia, J., dissenting).

The uncertainty these conflicts create threatens another central purpose of the Sentencing Reform Act. As then-Judge Breyer noted, Congress passed the Act not only to promote fairness to defendants, but also to foster clarity for the many other actors who participate in and are affected by the criminal justice system:

> Congress meant to end the previous system whereby a judge might sentence an offender to twelve years, but the Parole Commission could release him after four. Since release by the Parole Commission in such circumstances was likely, but not inevitable, this system sometimes fooled the judges, sometimes disappointed the offender, and often misled the public.

Breyer, *The Federal Sentencing Guidelines And The Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988). The present disagreement and uncertainty with respect to these issues, which are, by their nature, complex and sensitive, leaves those charged with making decisions – involving charging, plea bargaining, scheduling, sentencing, and prison administration – in both the state and federal systems to guess as to what the legal consequences of their actions will be.

In various filings before this Court, the Government has argued that the conflicts presented in the case are unimportant because, among other things, the States themselves could prevent impermissible anticipatory sentences, by refusing to allow defendants within their custody to appear before federal courts, see, *e.g.*, Br. in Opp., *Bishop* v. *United States*, No. 08-6175 at 22 (asserting that "the sovereign with primary jurisdiction over the defendant is not required to yield custody to the other sovereign; it may keep control over the defendant until the sentence expires") – and that the harms of unauthorized consecutive sentences may be undone by later-sentencing state courts or by the federal Bureau of Prisons, see *Martinez-Guerrero* Opp. at 8-9 (noting that defendants may ask the state court to shorten its sentence, to take into account the consecutive character of the federal one); *id.* at 7 (suggesting that "'only the BOP has

authority'" to make consecutiveness decision in these cases and might treat anticipatory sentence as only a "'recommendation'") (quoting *United States* v. *Hayes*, 535 F.3d 907, 910 (8th Cir. 2008)). Such assertions are problematic on their own terms and underscore the need for this Court's to address these issues directly and definitively.

First, the suggestion that States could avoid any problem by simply refusing to produce defendants for federal trial is a startling one, especially for the United States to make. Existing case law casts much doubt on this proposition. See, *e.g.*, *United States* v. *Bryant*, 612 F.2d 799, 802 (4th Cir.1979) (a State "does not have authority to reject a federal writ of *habeas corpus ad prosequendum*"), and there is every reason to expect that the United States would argue aggressively against it in an actual case. In so doing, it surely and properly would highlight the dramatic consequences such a veto would have for the administration of criminal justice. See *Ponzi*, 258 U.S. at 260 (explaining that producing defendants vindicates both their constitutional rights and the public's interest in speedy and fair trials); see also *Smith* v. *Hooey*, 393 U.S. 374, 379 (1969) (defendant's incarceration elsewhere does not relieve prosecuting authority of its speedy trial obligation).

Second, that a state court might in some cases be able to alter the sentence it would

impose to effectively negate a federal consecutive sentence imposed earlier is no consolation. In many cases, shorter sentences are prohibited under state law. See, *e.g.*, *Ballard*, 6 F.3d at 1504 & n.1 (noting that state charges carried mandatory minium). But even when state courts can artificially truncate the sentences they would impose in order to compensate for federal consecutive sentences imposed earlier, such "accommodations" inevitably smell of subterfuge and preclude courts from imposing the sentences their laws and policies actually support. State courts attempting to counteract a federal court's improper consecutive sentence in this way, moreover, run the risk that the defendant would escape appropriate punishment in the event the federal sentence is later overturned. It is telling that even the courts on the Eighth Circuit's side of the split do not agree as to the legal effect of a state court's *adhering* to its own state's punishment policies and imposing a concurrent sentence, in the face of a district court's anticipatory consecutive one. See n. 8, *supra*.

Finally, the BOP's own rules cast doubt on the United States's argument that the agency can, by use of its power to decide the "place" of federal confinement, see 18 U.S.C. § 3621(b)), replace a federal court's unlawful anticipatory sentence with an effectively concurrent one. Whether the BOP has the power to do so, it has announced that it

> will not allow a concurrent designation if the sentencing court has already made a determination regarding the order of service (e.g., the federal sentencing court ordered the sentence to run consecutively to any other sentence

BOP Program Statement § 5160.5(9)(b)(4)(f). Such language would appear to preclude the agency's "correcting" federal courts' improper consecutive sentencing decisions. But even if it does not completely foreclose remedial action, it fails to provide the clarity and compliance with the statute that review by this Court would bring.

CONCLUSION

The petition for a writ of certiorari should be granted.[11]

Respectfully submitted,

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[11]While the questions raised here warrant this Court's plenary consideration, petitioner requests, in the alternative, that the Court vacate the judgment in his case and remand the case to th Eighth Circuit for reconsideration in light of the Government's reversal of position.

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MAY 2009

APPENDIX

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FOR THE EIGHTH CIRCUIT
No. 08-2076
United States of America,
Appellee.
v.
Tommy Rollins, Jr.,
Appellant.

Submitted: December 9, 2008
Filed: January 21, 2009

Before MELLOY and BENTON, Circuit Judges, and DOTY,[1] District Judge.

BENTON, Circuit Judge.

Tommy Ray Rollins, Jr., pled guilty to possession of unregistered destructive devices, 26 U.S.C. §§ 5841, 5861(d), and 5871. He appeals the denial of a motion to withdraw his guilty plea and sentence. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

Rollins shot a Missouri highway patrolman and stashed two molotov cocktails near the house of intended victims. Federal and state

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[1]The Honorable David S. Doty, United States District Court for the District of Minnesota, sitting by designation.

prosecutors brought separate cases against Rollins. He pled guilty to the single federal charge, unregistered molotov cocktails, without a plea agreement. Rollins later moved pro se to withdraw his guilty plea. The district court[2] denied the motion, as well as a subsequent motion filed by counsel. A state court jury convicted Rollins in March 2008.

The district court imposed the federal sentence on May 1, 2008. With a Guidelines range of 135 to 168 months, the court imposed a 120-month sentence, the statutory maximum. The court ordered the federal sentence to be served consecutively to any yet-to-be-imposed state sentence. The state court imposed sentence on May 30: two concurrent life sentences, followed by concurrent 15- and 7-year sentences.

II.

"A guilty plea may be withdrawn before sentencing if the defendant demonstrates a 'fair and just reason' for the withdrawal." *United States* v. *Mugan,* 441 F.3d 622, 630 (8th Cir. 2006), *quoting* Fed. R. Crim. P. 11(d)(2)(B). "The defendant bears the burden of showing fair and just grounds for withdrawal." *Id.* at 630-31. This court reviews the denial of a motion to withdraw a guilty plea for abuse of discretion. *United States v. Maxwell,* 498 F.3d

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[2] The Honorable Howard F. Sachs, United States District Court for the Western District of Missouri.

799, 801 (8th Cir. 2007).

Rollins asserts that he was incompetent when he pled guilty, citing (1) a diagnosis for Major Depressive Disorder and Paranoid Personality Disorder, and (2) consumption of prescription medication. At the change-of-plea hearing, Rollins stated that he was not under the influence of any substance and that he understood the proceedings.

> Q: Are you mentally under the influence, that is, is your mind affected by drugs, medicine, pills, alcohol, anything you have had to eat or drink the past 48 hours?
>
> A: No.
>
> Q: Have you understood the proceedings so far?
>
> A: Yes.

Rollins's counsel stated at the hearing that Rollins was competent, and Rollins does not allege any error in the Rule 11 colloquy. Rejecting the motion to withdraw the plea, the district court noted that Rollins's pro se motion demonstrated "a considerably better than average understanding of the legal issues."

The district court did not abuse its discretion by rejecting the motion. Rollins's diagnosis does not, by itself, render his plea invalid. Demonstrating competence, Rollins was responsive and engaged during the Rule 11 colloquy. Even if suffering from a disease, a defendant's plea is valid if the record

demonstrates that he "understood the charges against him, was not dissatisfied with the services rendered by his attorney, and entered his plea knowingly and voluntarily." *United States* v. *McNeely,* 20 F.3d 886, 888 (8th Cir. 1994) (per curiam).

Likewise, the consumption of prescription medication is irrelevant, as Rollins told the court during the plea that he was not under the influence of any mind-altering substances. This situation differs from the cases cited by Rollins, where courts failed to explore competency during Rule 11 proceedings after a defendant then told the court of recent drug ingestion. *See United States* v. *Parra-Ibanez,* 936 F.2d 588, 59596 (1st Cir. 1991); *United States* v. *Cole,* 813 F.2d 43, 47 (3d Cir. 1987).

Rollins also appeals the sentence. He contends that the district court erred by imposing a sentence consecutive to a yet-to-be-imposed state sentence, and that he should receive credit for time served as a state pretrial detainee. This court reviews the district court's interpretation of the Sentencing Guidelines de novo, and its application of the Guidelines to the facts for clear error. *United States* v. *Pando,* 545 F.3d 682, 683 (8th Cir. 2008). This court reviews a district court's decision to impose a concurrent or consecutive sentence for reasonableness. *United States* v. *Winston,* 456 F.3d 861, 867 (8th Cir. 2006).

Rollins asserts that the district court erred

by not applying United States Sentencing Guideline § 5G1.3(b) when sentencing him. That section applies if "a term of imprisonment resulted from another offense that is relevant conduct" under U.S.S.G. § 1B1.3(a)(1)-(3). U.S.S.G. § 5G1.3(b). If applicable, § 5G1.3(b) directs that "the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment." *Id.* § 5G1.3(b)(2).

Section 5G1.3(b) does not apply here. The district court sentenced Rollins before the state court sentenced him. At the time of federal sentencing, Rollins was not subject to a "term of imprisonment." *See* 8 U.S.C. § 1101(a)(48)(B) (defining "term of imprisonment" as "the period of incarceration or confinement ordered by a court of law"). Thus, the district court had discretion to impose "a federal sentence to be served consecutively to a yet-to-be-imposed state sentence." *United States* v. *Mayotte,* 249 F.3d 797, 799 (8th Cir. 2001) (per curiam).[3]

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[3] The *Mayotte* opinion says that four circuits agree with this rule, and three disagree. While three circuits still agree, five circuits now disagree with this court. *See United States* v. *Donoso*, 521 F.3d 144, 147-49 (2d Cir. 2008) (per curiam) (disagree); *United States* v. *Smith*, 472 F.3d 222, 226 (4th Cir. 2006) (disagree, but applying its rule to a yet-to-be-imposed federal sentence); *Romandine* v. *United*

"In exercising its discretion, the district court must, pursuant to [18 U.S.C.] section 3584(b), consider the factors set forth in 18 U.S.C. § 3553(a)." *Id.* Here, the district court considered the § 3553(a) factors when imposing a consecutive sentence.[4] Noting that the Guidelines recommend a sentence of 135 to 168 months, the court stated that it could have ordered the same 120-month consecutive sentence by finding that Rollins's criminal history did not adequately reflect his past criminal conduct and dangerousness to the public. *See* 18 U.S.C. § 3553(a)(1), (a)(2)(C).

States, 206 F.3d 731, 738-39 (7th Cir. 2000) (disagree); *United States v. Quintero*, 157 F.3d 1038, 1039-41 (6th Cir. 1998) (disagree); *United States v. Williams*, 46 F.3d 57, 58-59 (10th Cir. 1995) (agree); *United States* v. *Ballard*, 6 F.3d 1502, 1510 (11th Cir. 1993) (agree); *United States* v. *Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991) (agree), *abrogated on other grounds by United States v. Candia*, 454 F.3d 468, 472-73 (5th Cir. 2006) (noting changed standard of review); *United States v. Eastman*, 758 F.2d 1315, 1317-18 (9th Cir. 1985) (disagree).

[4] The district court cited U.S.S.G. § 5G1.3(c) when applying the § 3553(a) factors. Section 5G1.3(c) applies when the defendant is subject to an "undischarged term of imprisonment." Since § 5G1.3(c) directs the district court to apply the § 3553(a) factors when determining whether to apply a concurrent or consecutive sentence, any error in applying U.S.S.G. § 5G1.3(c) is harmless.

Since the district court considered the § 3553(a) factors and committed no significant procedural error, and Rollins does not challenge the substantive reasonableness of the sentence, this court affirms the sentence.

Finally, Rollins seeks credit for the 36 months he spent as a pretrial detainee in state custody, citing U.S.S.G. § 5G1.3. For the reasons stated, § 5G1.3 does not apply here.

III.

The district court's judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. Case No.: 05.00417-01-CR-W-HFS

TOMMY RAY ROLLINS, JR.,
Defendant

May 1, 2008

TRANSCRIPT OF SENTENCING HEARING

On Thursday May 1, 2008, the above-entitled cause came on before the Honorable Howard Sachs, U.S. District Judge, sitting in Kansas, City, Missouri.

APPEARANCES

For the Plaintiff: MR. RUDOLPH R. RHODES, IV
Assistant United States Attorney

For the Defendant: MR. RONALD E. PARTEE

Donna M. Turner, RMR
U.S. Court Reporter

[Sentencing Hearing Transcript (May 1, 2008), pp. 52-56]

* * * *

THE COURT: I will use the statutory ten-year sentence in this case and I would not direct that it be applied concurrently, so my supposition is that it will be -- would be served consecutively. I'm not sure how you have a consecutive sentence after a life sentence, if the parole commission does not release the defendant. It does seem to me that the state court convictions are sufficiently separate from the Molotov cocktail situation here. That it would be pretty much allowing the tail to wag the dog if I would treat them as essentially overlapping.

It's true that apparently there are two conviction counts of 15 years and seven years that do coincide with some issues that are considered here, but my supposition is that they would be subsumed by the life sentences that have been imposed and would not result in consecutive sentencing in state court.

Although the intended attack on Mr. Scott's home and the shooting of the trooper occurred on the same day, I don't think they were sufficiently interlocked that there should be consecutive -- I mean, that there should be concurrent service of the punishment for what is basically two crimes, and I have tried to keep my focus on the intended arson case, partly for the purpose of separating out the

two -- the two basic crimes. I have recognized from the beginning that if we commingle them, that concurrent sentencing would be more appropriate.

I acknowledge there's a certain overlap in the enhancements that are used here, but I really don't think i's possible to put the two cases together for purposes of sentencing and still achieve a sound result here. So I am operating under 5G1.3(c) in attempting to use a reasonable punishment for this offense.

I will adopt the probation officer's second addendum and the probation officer's response to the objections to the second addendum. They do seem to be sound. I will, however, use a four-point departure upward for intent to injure members of the Scott family through the intended arson at their home. And if I do that, we're dealing with offense Level 31, which at Criminal History Category III would result in a guideline sentence of 135 to 168 months, which is of course more than the maximum ten-year sentence.

If I didn't reach the ten-year sentence that way, I would seriously consider using a theory that the criminal history was not adequately reflective of the seriousness of the defendant's criminal conduct and dangerousness to the public, so I could reach the same result, as I say, to the approach that the criminal history category was inadequate.

The result that I have discussed does take

us to a guideline that's above the statutory maximum, so the statutory maximum will be controlling, 120 months will be controlling.

I'll hand forward the papers that will be read into the record.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant, Tommy Ray Rollins Jr., is hereby committed to the custody of the Bureau of Prisons to be imprisoned for 120 months on this one-count indictment.

Upon release from imprisonment, the defendant shall be placed on supervised release for three years. Since the court finds the defendant does not have the ability to pay a fine, the fine is waived. It's further ordered the defendant shall pay to the United States a special assessment of $100 which shall be due immediately.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court. In addition, the defendant shall comply with the following special conditions: Successfully participate in any substance abuse counseling program which may include urinalysis, sweat patch or breathalyzer testing as approved by the probation office and pay any associated costs as directed by the probation office. Successfully participate in any mental health counseling program as directed by the probation office and pay any associated costs

as directed by the probation office.

The defendant shall submit his person, residence, office or vehicle to a search conducted by a United States probation officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

The defendant shall remain in custody.

I do advise -- I take it he'll be returned to state custody. I do advise that a defendant who wishes to appeal from a sentencing decision and from my various rulings denying the right to withdraw the plea and other requests, a person wishing to appeal can only do so by filing a notice of appeal within ten days of this date. And a person unable to pay the costs of appeal may apply for leave to appeal in forma pauperis.

If there is nothing further to take up with me in this case today, court will be adjourned.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. Case No.: 05.00417-01-CR-W-HFS

TOMMY RAY ROLLINS, JR.

Ronald E. Partee, CJA

JUDGMENT IN A CRIMINAL CASE
The defendant pleaded guilty to Count 1 of the Indictment on April 29, 2006. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
26 U.S.C. 5841, 5861(d) and 5871	Possession of unregistered destructive devices	May 28, 2005	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments

imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: May 1, 2008

/s/ Howard F. Sachs
HOWARD F. SACHS
SENIOR UNITED STATES DISTRICT JUDGE
May 9, 2008

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 120 months on this one-count Indictment.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____to_____

at, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____

Deputy U.S. Marshal

§ 5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

(3)

No. 08-1453

In the Supreme Court of the United States

TOMMY RAY ROLLINS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court directed that petitioner's federal sentence run consecutively to a state sentence that had not yet been imposed, and, if so, whether the court thereby committed reversible plain error.

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In the Supreme Court of the United States

No. 08-1453

TOMMY RAY ROLLINS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 552 F.3d 739.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2009. On April 9, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including May 21, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the Western District of Missouri, petitioner was convicted of one count of possessing unregistered firearms (destructive devices), in violation of 26 U.S.C. 5841, 5861(d), and 5871. He was

sentenced to 120 months of imprisonment, to be followed by three years of supervised release. The district court denied his request for an order that his federal sentence run concurrently with his anticipated state sentences on pending charges. Pet. App. 9a, 11a, 13a, 15a. The court of appeals affirmed. *Id.* at 1a-7a.

1. On May 28, 2005, at approximately 2:00 a.m., petitioner was driving on an interstate highway in a car that had no registration. Trooper Brandon Brashear of the Missouri State Highway Patrol signaled petitioner to pull over, and after a brief chase, the car stopped on the shoulder. As Trooper Brashear got out of his patrol car, petitioner got out of his vehicle carrying a 9mm handgun. Trooper Brashear drew his own firearm and ordered petitioner to drop the gun; petitioner replied, "No, you're gonna die motherfucker tonight," and began shooting. Petitioner fired at least 15 shots, 10 of which struck Trooper Brashear, inflicting life-threatening injuries. Presentence Investigation Report ¶¶ 5-6, 9 (PSR).

About an hour later, petitioner entered a pool hall in Independence, Missouri, and told patrons that he had just shot a police officer and that they needed to call the police. Within minutes, city police officers arrived on the scene and arrested petitioner. After being advised of his rights, petitioner told the police, among other things, that he had purchased the "Mac-10" to kill his former employer, Dred Scott. He also admitted shooting Trooper Brashear numerous times. PSR ¶¶ 8, 11.

Petitioner agreed to show investigators where he had discarded the firearm used to shoot Trooper Brashear, and he directed them to a nearby field that was approximately two blocks from Scott's house. Officers recovered two Molotov cocktails made out of 40-ounce beer

bottles filled with gasoline, with white washcloths serving as wicks; the 9mm pistol, loaded with eight rounds of ammunition; and a piece of white paper with directions to Scott's house. The Molotov cocktails were not registered to petitioner in the National Firearms Registration and Transfer Record. Petitioner admitted that he had planned to firebomb Scott's house and then shoot the family as they fled. PSR ¶¶ 9-10.

2. Petitioner was first charged in state court in Jackson County, Missouri, with first-degree assault on a law enforcement officer (attempted murder), armed criminal action (against Trooper Brashear), first-degree assault (against Scott), and unlawful possession of an illegal weapon. PSR ¶ 42.

Subsequently, a federal grand jury sitting in the Western District of Missouri returned an indictment charging petitioner with one count of possessing unregistered firearms, *i.e.*, the two Molotov cocktails, in violation of 26 U.S.C. 5841, 5861(d), and 5871. Indictment 1. A Molotov cocktail is a "destructive device," and a "destructive device" is a firearm under the relevant federal statute. 26 U.S.C. 5845(a)(8) and (f)(1)(A).

While the state charges were still pending, petitioner appeared in federal court pursuant to a writ of habeas corpus *ad prosequendum* and pleaded guilty to the federal indictment. Pet. App. 2a, 13a; PSR 1. The district court convened a sentencing hearing three months later, but ordered the sentencing continued and a revised PSR prepared. See PSR 2d Addendum 1.[1] Both federal and state proceedings were then continued for a lengthy period because of concerns about petitioner's compe-

[1] The district court directed that the advisory Sentencing Guidelines range be re-calculated without relying on petitioner's shooting of Trooper Brashear as relevant conduct to the firearm conviction.

tency. Once petitioner was found competent, he proceeded to trial in state court, and the jury found him guilty on all counts. See Pet. 7-8. Petitioner faced a maximum sentence of life imprisonment.

Petitioner returned to federal court for sentencing. Defense counsel asked the district court to continue the sentencing proceeding until after petitioner was sentenced in his state case, noting that the court could then take into account the length of the state sentence and that petitioner would then have a stronger basis under the Sentencing Guidelines for asking the district court to order that his federal sentence run concurrently with his state sentence. See 5/1/2008 Sent. Tr. 7-8, 13-14; see also *id.* at 46-47.[2] The government opposed a continuance, citing the previous postponements of sentencing. *Id.* at 8-9, 15. The court denied the request for a continuance. *Id.* at 16.

The district court adopted the Second Addendum to the PSR, which calculated an advisory Sentencing Guidelines range of 87 to 108 months based on a total offense level of 27 and a criminal history category of III. 5/1/2008 Sent. Tr. 44; PSR 2d Addendum ¶ 19.[3] Peti-

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[2] Petitioner cited Sentencing Guidelines § 5G1.3(b), which provides in relevant part that "[i]f * * * a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction * * * and that was the basis for an increase in the offense level for the instant offense * * * (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment."

[3] The base offense level was 24 under the guideline for the offense for which the Molotov cocktails were to be used. See Sentencing Guidelines §§ 2A1.4(a)(1), 2K2.1(c)(1), 2X1.1(a). Petitioner also received a six-level enhancement under Sentencing Guidelines § 3A1.2(c), because the victim was a law enforcement officer, and a three-level reduction for ac-

tioner faced a statutory maximum sentence of 120 months of imprisonment. See 26 U.S.C. 5871.

Defense counsel asked the court to impose a below-Guidelines sentence within a range of 24 to 30 months. 5/1/2008 Sent. Tr. 47. Alternatively, if the court were inclined to impose a sentence within or above the advisory Guidelines range, counsel asked the court to order that the federal sentence run concurrently with petitioner's not-yet-imposed state sentence. *Id.* at 45-47. Defense counsel did not discuss whether the district court had authority to direct that his federal sentence be served consecutively or concurrently; he only asked that the court order a concurrent sentence.

The government asked the court to depart upward and to sentence petitioner to the statutory maximum of 120 months in light of the severity of petitioner's crime and his intent to inflict serious harm on the Scott family by firebombing their house. 5/1/2008 Sent. Tr. 48-50. The government also asked the court to order that petitioner's federal sentence run consecutively to his not-yet-imposed state sentence. *Id.* at 50.

Before imposing sentence, the district court denied petitioner's request that his federal sentence run concurrently with his not-yet imposed state sentence; the court entered no order at all on concurrent or consecutive sentencing. The court stated:

> I will use the statutory ten-year sentence in this case and I would not direct that it be applied concurrently, so *my supposition is* that it will be—would be served consecutively. I'm not sure how you have a consecutive sentence after a life sentence, if the pa-

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ceptance of responsibility under Sentencing Guidelines § 3E1.1. See PSR 2d Addendum ¶¶ 6-17.

> role commission does not release the defendant. It does seem to me that the state court convictions are sufficiently separate from the Molotov cocktail situation here. That it would be pretty much allowing the tail to wag the dog if I would treat them as essentially overlapping.

Pet. App. 9a (emphasis added).

The district court then sentenced petitioner to the statutory maximum of 120 months. Pet. App. 11a. The court explained that it was departing upwards by four levels because it found that petitioner had "inten[ded] to injure members of the Scott family through the intended arson at their home." *Id.* at 10a. The resulting revised Guidelines range was 135 to 168 months, above the statutory maximum. *Ibid.* The court therefore imposed the statutory maximum sentence of 120 months of imprisonment, to be followed by three years of supervised release. *Id.* at 10a-11a.[4] The court's oral pronouncement of sentence did not direct that the sentence run consecutively to the future state sentence. See *id.* at 11a-12a. Nor did the district court's written judgment memorializing the sentence contain any such direction. See *id.* at 13a-15a.

3. Several weeks after petitioner's federal sentencing, the state court sentenced petitioner to concurrent sentences of life imprisonment for assaulting a law enforcement enforcer and armed criminal action; 15 years for his other assault (his intended attack on Scott); and

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[4] The court also noted that, even without the upward departure for the arson, it likely would have imposed the statutory maximum on the alternative ground that petitioner's criminal history category did not adequately represent his past criminal conduct or dangerousness to the public. Pet. App. 10a; see Sentencing Guidelines § 4A1.3(a), p.s.

seven years for his unlawful weapons possession. The state court ordered that the latter two sentences run consecutively to the life sentences and concurrently with each other. Pet. App. 2a; Pet. 10.

Because the State had primary jurisdiction over petitioner, he began serving his state sentence immediately upon sentencing. His federal sentence has not yet commenced.

4. Petitioner appealed. As relevant here, petitioner contended in his appellate brief that Sentencing Guidelines § 5G1.3(b) had required the district court to order that his sentence run concurrently with his anticipated state sentence. Under specified circumstances, where "a term of imprisonment resulted from another offense that is relevant conduct" under the Guidelines, Section 5G1.3(b) directs the district court to impose a sentence concurrent with the remainder of the undischarged term of imprisonment. See note 2, *supra* (quoting provision). Petitioner contended that, as a factual matter, the conduct underlying his state convictions had been used to enhance his federal sentence and that, therefore, the sentences should have been ordered to run concurrently. Pet. C.A. Br. 24-25. Petitioner did not argue that the district court had lacked authority to direct whether his sentence should run consecutively or concurrently.

5. The court of appeals affirmed. Pet. App. 1a-7a.

As relevant here, the court of appeals held that Sentencing Guidelines § 5G1.3(b) did not bind the district court in petitioner's case, because that provision applies only when the defendant has a prior "'undischarged term of imprisonment,'" and "[a]t the time of federal sentencing, [petitioner] was not subject to a 'term of imprisonment.'" Pet. App. 5a (quoting Sentencing Guidelines § 5G1.3(b)). The court of appeals therefore con-

cluded, based on circuit precedent, that "the district court had discretion" to order that the federal sentence run either consecutively to or concurrently with the yet-to-be-imposed state sentence. *Ibid.* (citing *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam)).

6. Petitioner did not seek rehearing.

ARGUMENT

Petitioner contends for the first time (Pet. 13-41) that the district court lacked authority to determine whether his federal sentence should be served consecutively to or concurrently with his subsequently imposed state sentences. But in this case the district court did not make any such determination; it simply "suppos[ed]" that the sentences would run consecutively, Pet. App. 9a, and the judgment of conviction is silent on the matter. Accordingly, the legal issue that petitioner asks this Court to review is not presented in this case, and petitioner is free to ask the Federal Bureau of Prisons (BOP) to make his federal sentence concurrent with his state sentences by commencing his federal sentence while he is serving his state sentence.

Even if the district court could be read to have ordered that petitioner's sentences run consecutively, this case would not warrant review. Although the government agrees with petitioner that district courts lack the authority under 18 U.S.C. 3584(a) to enter such an order, this Court has repeatedly declined to resolve the circuit conflict on that issue, because it lacks real significance and because it may be re-examined in the courts of appeals. And this case would not be an appropriate vehicle to resolve that conflict in any event: even if petitioner's case implicated the question, petitioner pre-

served no objection and, indeed, affirmatively urged the district court to use the authority that he now claims it lacks. Petitioner could not establish reversible plain error; among other reasons, his state sentences—totaling life imprisonment plus 15 years—make it unclear whether petitioner's federal sentence will ever affect his substantial rights at all.

1. Petitioner is incorrect in asserting that "the district court * * * direct[ed] that [petitioner's federal sentence] be served consecutively to the impending, but still unannounced, state sentences." Pet. 9; see Pet. 11-12. The district court made no such direction, in either its oral pronouncement of sentence (Pet. App. 11a-12a) or the written judgment (*id.* at 13a-15a). To the contrary, the court declined to direct that the sentence be served concurrently with petitioner's anticipated state sentences, and it stated its "supposition" that petitioner would therefore serve his sentences consecutively, by operation of law and not by direction of the court. *Id.* at 9a ("I will use the statutory ten-year sentence in this case and I would not direct that it be applied concurrently, so my supposition is that it will be—would be served consecutively.").

The government suggested in its brief in the court of appeals that the district court had entered an order directing a consecutive sentence, Gov't C.A. Br. 22, and the court of appeals made the same assertion in reciting the facts of the case, Pet. App. 2a. Whether the district court ordered a consecutive sentence or simply stood silent on the matter was irrelevant to the issue petitioner raised on appeal—whether, under the Sentencing Guidelines, the district court should have imposed a *concurrent* sentence. Nonetheless, on further consideration of the issue in light of the record, the government's brief

and the opinion below incorrectly characterized petitioner's sentence.

As petitioner acknowledges (Pet. 40-41), BOP has discretion to start his federal sentence while he is in state custody, thereby effectively granting him the concurrent sentence he seeks. Petitioner notes that BOP will not exercise that discretion in the face of an order by a federal district court that the sentence run consecutively. See *ibid.* (citing Federal Bureau of Prisons, U.S. Dep't of Justice, *Program Statement No. 5160.05, Designation of State Institution for Service of Federal Sentence* § 9(b)(4)(f), at 6-7 (2003) (*Designation Program Statement*)). But there is no such order in the judgment here (which is what BOP reviews in making that determination), and we have confirmed with BOP that it would not regard petitioner as foreclosed from seeking a concurrent designation. Any error in how the government's appellate brief characterized the district court's sentencing order therefore will not have any effect on petitioner.

2. As petitioner points out (Pet. 13-23), the courts of appeals disagree about whether a federal district court has the authority to direct that a sentence be served consecutively or concurrently to a yet-to-be-imposed state sentence. In the government's view, contrary to the current position of the court below, 18 U.S.C. 3584(a) does not confer that authority. Nevertheless, even if petitioner were correct that the district court had entered such an order, further review of that question would not be warranted.

a. The first sentence of Section 3584(a) identifies two situations in which a court may take into account other sentences: when "multiple terms of imprisonment are imposed on a defendant at the same time," and when

"a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." The second and third sentences establish the default presumptions that correspond to each of those situations when the district court's order is silent on whether the sentences are to be consecutive or concurrent. A federal defendant who has not yet received, but may one day receive, a sentence in a separate state-court proceeding does not fall within either of the two situations specified in the first sentence of Section 3584(a). For that reason, in the government's view, the presumptions set out in the remainder of that subsection have no application to such a defendant.

The Second, Sixth, and Ninth Circuits have taken that view. *United States* v. *Donoso*, 521 F.3d 144, 146-149 (2d Cir. 2008) (per curiam); *United States* v. *Quintero*, 157 F.3d 1038, 1039-1041 (6th Cir. 1998); *United States* v. *Clayton*, 927 F.2d 491, 492-493 (9th Cir. 1991); see also *United States* v. *Smith*, 472 F.3d 222, 225-227 (4th Cir. 2006) (holding that a federal district court lacks authority to impose a federal sentence consecutive to an as-yet-unimposed federal sentence). The Seventh Circuit has also held, for distinct reasons, that federal district courts lack authority to impose a sentence that runs consecutively to a future sentence. See *Romandine* v. *United States*, 206 F.3d 731, 737-738 (2000).

Four courts of appeals, including the court below, have taken the contrary view. These courts have concluded either that federal district courts have the inherent authority to impose consecutive sentences and that Section 3584(a) does not withdraw it, see *United States* v. *Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001) (per curiam); *United States* v. *Brown*, 920 F.2d 1212, 1217 (5th Cir.) (per curiam), cert. denied, 500 U.S. 925 (1991), or

that Section 3584(a)'s third sentence affirmatively permits terms of imprisonment to be run consecutively even before the second term of imprisonment has been imposed, see *United States* v. *Williams*, 46 F.3d 57, 59 (10th Cir.), cert. denied, 516 U.S. 826 (1995); *United States* v. *Ballard*, 6 F.3d 1502, 1507-1510 (11th Cir. 1993); see also *United States* v. *McDaniel*, 338 F.3d 1287, 1288 (11th Cir. 2003) (per curiam) (Section 3584(a) also affirmatively permits terms of imprisonment to be ordered to run *concurrently* even before the second term of imprisonment has been imposed). If those interpretations were correct, however, Congress's specification, in the first sentence of Section 3584(a), of two situations in which the court has discretion to run sentences concurrently or consecutively would have been unnecessary: if courts had inherent authority to make consecutive-versus-concurrent determinations, the limiting conditions in the first sentence would be beside the point, and if Section 3584(a)'s third sentence conferred authority to run sentences consecutively or concurrently in *all* cases in which sentences are imposed at different times, it would have made little sense for the first sentence to refer to a sentencing court's authority when the defendant has a prior undischarged term of imprisonment. Treating Section 3584(a) as an integrated whole avoids rendering its provisions partially superfluous.[5]

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[5] That reading is confirmed by 18 U.S.C. 3584(b), which directs federal courts to consider the sentencing factors set out in 18 U.S.C. 3553(a) in deciding whether to impose concurrent or consecutive terms of imprisonment. Several of those factors involve consideration of the total length of incarceration, see, *e.g.*, 18 U.S.C. 3553(a)(2)(B), (2)(C), and (6), and that analysis cannot logically take place when one of the defendant's sentences has not yet been determined, and indeed may never be imposed.

b. As the government has previously explained, however, the differences between the circuits' interpretations of Section 3584(a) have little practical impact. Accordingly, this Court has repeatedly declined to review the question presented. See *Valenciano-Espinoza* v. *United States*, 129 S. Ct. 2849 (2009) (No. 08-10524); *Maden* v. *United States*, 129 S. Ct. 2848 (2009) (No. 08-10520); *Jochum* v. *United States*, 129 S. Ct. 2782 (2009) (No. 08-10199); *Smith* v. *United States*, 129 S. Ct. 2735 (2009) (No. 08-8118); *Garcia* v. *United States*, 129 S. Ct. 2734 (2009) (No. 08-6756); *Goodgion* v. *United States*, 129 S. Ct. 1734 (2009) (No. 08-5920); *DeLeon* v. *United States*, 129 S. Ct. 1307 (2009) (No. 08-6055); *Bishop* v. *United States*, 129 S. Ct. 1307 (2009) (No. 08-6175); *Dimas* v. *United States*, 129 S. Ct. 1307 (2009) (No. 08-6165); *Martinez-Guerrero* v. *United States*, 129 S. Ct. 52 (2008) (No. 07-1362); *King* v. *United States*, 128 S. Ct. 706 (2007) (No. 07-5307); *Lopez* v. *United States*, 128 S. Ct. 705 (2007) (No. 07-5060); *Cox* v. *United States*, 547 U.S. 1127 (2006) (No. 05-454); *Lackey* v. *United States*, 545 U.S. 1142 (2005) (No. 04-9286); *Martinez* v. *United States*, 543 U.S. 1155 (2005) (No. 04-7129); and *Andrews* v. *United States*, 540 U.S. 1003 (2003) (No. 03-136).[6]

The principal reason why the question does not require resolution by this Court is that under current law, the second court to sentence a defendant will often make its own decision concerning how long the defendant will spend in prison, irrespective of whether the first sentencing court specified a concurrent or consecutive sen-

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[6] The same question is also asserted by the pending petitions for a writ of certiorari in *Farris* v. *United States*, No. 08-10700 (filed May 26, 2009); *Brockman* v. *United States*, No. 08-1427 (filed May 19, 2009); *Garcia* v. *United States*, No. 08-10721 (filed May 19, 2009); and *Brent* v. *United States*, No. 08-9319 (filed Mar. 16, 2009).

tence. For example, if a defendant is sentenced in state court after being sentenced in federal court, the state court generally can adjust the length of the state sentence (or suspend a portion of the sentence) to take into account the time the defendant has served or will serve in federal custody. See, *e.g.*, *Romandine*, 206 F.3d at 738 (explaining that the correct "answer" to the circuit conflict "does not matter, and the conflict is illusory").

Even when a defendant faces both federal and state sentences, the terms often do not overlap, simply because the sovereign with primary jurisdiction over the defendant is not required to yield custody to the other sovereign; it may keep control over the defendant until the sentence expires. See generally *Ponzi* v. *Fessenden*, 258 U.S. 254, 261 (1922) (explaining primary jurisdiction over defendants prosecuted by separate sovereigns). As here, the sovereign with primary jurisdiction may permit the other sovereign to try and convict the defendant during that time, but even then, the other sovereign is not entitled to execute its sentence by taking the defendant into custody.

Petitioner misreads this line of authority (Pet. 38-39) as questioning federal authorities' ability to obtain *temporary* custody of an inmate in primary state custody and put him on trial. That is not so, as this case illustrates: petitioner was arrested by state authorities and is in primary state custody, but was "loaned" to the federal authorities to stand trial pursuant to a writ of habeas corpus *ad prosequendum*. Rather, federal authorities may not demand that the State deliver up an inmate *so that he may begin serving his federal sentence*.

BOP does retain discretion, under certain circumstances, to allow a state inmate to begin serving his federal sentence while still physically in state custody.

BOP has detailed protocols governing such a decision, and it gives considerable (though not dispositive) weight to the federal sentencing court's intent even if that intent is not embodied in a sentencing order. See *Designation Program Statement* § 9(b) at 4-7; see also 18 U.S.C. 3621(b) (listing pertinent factors). Even if (as here) the sentencing court's intent is not embodied in the judgment, BOP consults directly with the sentencing court by letter to ascertain its views on whether the sentences should be allowed to run concurrently. See *Designation Program Statement* § 9(b)(4)(c) at 6. Petitioner has not asked BOP to commence his federal sentence, though he may still do so, as discussed above. See pp. 9-10, *supra*.

c. Of the four courts of appeals that permit federal courts to impose a sentence consecutively to a not-yet-imposed state sentence, two have mitigated the effect of that holding by suggesting that a federal judgment containing such a directive does not bar the state court from taking steps in the future to permit a concurrent sentence. See *United States* v. *Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008); *United States* v. *Andrews*, 330 F.3d 1305, 1307 n.1 (11th Cir.) (per curiam), cert. denied, 540 U.S. 1003 (2003); see also *United States* v. *Douglas*, 569 F.3d 523, 527 n.2 (5th Cir. 2009) (defendant withdrew his challenge "because the state proceedings concluded and the state court has chosen to run his state sentence concurrently with the time he is serving in federal custody"). The other two circuits have not clearly spoken to the issue whether a state court is so bound. The Tenth Circuit has said that a state court cannot override a federal court's determination, but on the facts of that case, the State effectively did so by releasing the defendant to federal custody with the statement that he

had satisfied his state sentence. *Williams*, 46 F.3d at 58. The Eighth Circuit has said that "the federal sentence controls" in the event of a conflict, *Mayotte*, 249 F.3d at 799, but did not address the practical implementation of that statement. Thus, even in the circuits that read Section 3584(a) to authorize imposing a sentence consecutively to a future sentence, any practical impact of that interpretation on subsequent sentencing courts is speculative at best.

d. In the government's view, the conflict over the interpretation of Section 3584(a) is best suited to resolution in the lower courts. Indeed, the courts of appeals that disagree with the government's interpretation (and petitioner's), including the court below, have displayed some willingness to reconsider that stance in an appropriate case. The government has both encouraged that re-examination in the courts of appeals and taken steps to oppose consecutive-sentencing orders in the district courts. See pp. 16-18, *infra*. Accordingly, even if the question had some substantive impact that gave it continuing significance, review by this Court would be premature at this time.

The Eighth Circuit recently granted a petition for rehearing en banc to re-examine the issue. See *United States* v. *Lowe*, 312 Fed. Appx. 836 (2009), reh'g en banc granted, No. 08-2304 (Apr. 22, 2009), reh'g vacated and opinion reinstated (Aug. 31, 2009). In that case, the government took the position that the Eighth Circuit's precedent "should be overruled in an appropriate case," but explained that Lowe's was not a suitable vehicle because Lowe had not preserved an objection and could not prevail *on plain-error review*. Gov't Resp. to Pet. for Reh'g En Banc at 6, *Lowe*, *supra* (No. 08-2304). Lowe subsequently filed a pleading essentially agreeing with the

government that he could not show any effect on his substantial rights, and the court of appeals therefore vacated its grant of rehearing en banc as improvidently granted.

Some months ago, the Fifth Circuit, too, ordered briefing on the question whether its precedent on the issue "should be overruled or modified." *United States* v. *Garcia-Espinoza*, No. 08-10775 (Dec. 18, 2008). The government filed a brief recommending that, when presented with an "appropriate case," the court should "overrule or modify [its precedent] and hold that [Section] 3584(a) does not authorize a district court to order that the federal term of imprisonment be served consecutively to a yet-to-be-imposed state sentence." Gov't Br. at 7, *United States* v. *Garcia-Espinoza*, 325 Fed. Appx. 380 (5th Cir. 2009) (No. 08-10775). The government noted, however, that Garcia-Espinoza's case was a poor vehicle, because his state sentence had already expired and his demand for a concurrent sentence was essentially moot. The Fifth Circuit accordingly denied a hearing en banc in that case, see *United States* v. *Garcia-Espinoza*, No. 08-10775 (Apr. 13, 2009), but it may identify another suitable case in which to reconsider the issue. Two of the three judges in *Garcia-Espinoza* advocated that the court do just that. *Garcia-Espinoza*, 325 Fed. Appx. at 381 (Owen, J., joined by Dennis, J., concurring) ("writ[ing] separately to recommend that the court re-examine en banc how we have previously construed 18 U.S.C. § 3584").

The government has also taken steps to ensure that federal prosecutors act consistently with the interpretation of Section 3584(a) discussed above. On January 8, 2009, after sentencing and completion of appellate briefing in this case, the Executive Office for United States

Attorneys informed all United States Attorneys' Offices that the Solicitor General, on behalf of the Department of Justice, had adopted that interpretation. In accompanying guidance, all federal prosecutors were directed to urge sentencing courts not to order that a sentence run consecutively to (or concurrently with) a yet-to-be-imposed sentence. In addition, except where circuit precedent or, as here, the plain-error standard of review dictates otherwise, the government will not defend an order that runs the federal sentence consecutively to a yet-to-be-imposed sentence.

We are aware of some district courts that have continued to order that their sentences run consecutively to future state sentences consecutive-sentencing orders. And the Fifth Circuit has affirmed some such sentences summarily, based on circuit precedent. We are aware of no case since *Garcia-Espinoza*, however, in which the Fifth Circuit (or any other court of appeals) has denied a petition for rehearing en banc on this issue. (Petitioner did not seek rehearing en banc.)

3. Even if the issue were presented on the facts of this case and warranted review by this Court, this case would not be a suitable vehicle. Petitioner never raised his argument about the correct interpretation of Section 3584(a) in the district court. To the contrary, he affirmatively asked the district court to use its authority to direct a concurrent sentence. Accordingly, he is limited to seeking review for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725 (1993). Moreover, petitioner did not raise the issue in the court of appeals, see p. 7, *supra*, and the court did not address it except in addressing the entirely distinct question whether the district court was bound by Sentencing Guidelines § 5G1.3(b) or whether it instead had discre-

tion. This Court does not generally review issues raised for the first time on certiorari review.

Petitioner could not prevail on plain-error review, because he could not meet his burden to show an effect on his "substantial rights," Fed. R. Crim. P. 52(b), even if the district court had truly entered an order precluding him from obtaining a concurrent sentence through the exercise of BOP's discretion. Petitioner is in primary state custody, serving two concurrent terms of life imprisonment, to be followed by an additional consecutive sentence of fifteen years. Accordingly, petitioner's federal sentence will have no effect on his total time of incarcaration unless he is paroled by the State or otherwise released before serving a life term on his state sentences. Petitioner may not even be eligible for parole at all. See Board of Probation & Parole, Missouri Dep't of Corr., *Procedures Governing the Granting of Paroles and Conditional Releases* § 28(C) at 13 (Apr. 2009) <http://www.doc.mo.gov/division/prob/pdf/Blue%20Book.pdf> ("Offenders who receive sentences consecutive to a paroiable iife sentence when the consecutive sentences are for crimes occurring on or after August 28, 1994, may not be eligible for parole. Parole eligibility will be determined on a case by case basis."); *id.* § 19(E) at 10 ("For offenders serving *multiple life sentences or other sentences concurrent or consecutive to a life sentence* the Board may, due to the nature and length of the sentence, determine not to set a minimum eligibility date."); see also *Pettis* v. *State*, 212 S.W.3d 189, 194 (Mo. Ct. App. 2007) (describing Missouri rule that "upon imposition of a consecutive term of imprisonment, [prisoner's] parole-eligible life sentence would definitely, immediately, and automatically convert to a sentence of life without possibility of parole"). At a minimum, peti-

tioner will serve more than 38 years in state prison before he becomes eligible for parole, as his assault convictions were for "dangerous felon[ies]" under Mo. Ann. Stat. § 556.061(8) (West Supp. 2009).[7] And even if petitioner is eventually eligible for parole, there is no guarantee that he will be paroled. See Mo. Ann. Stat. § 217.690 (West 2004).

Thus, to establish a genuine effect on his substantial rights—*i.e.*, an effect on the outcome—petitioner would have to show that (a) he is eligible for and likely to receive parole or otherwise likely to be released from state confinement during his lifetime, and (b) absent the supposed order from the federal court requiring a consecutive sentence, BOP would likely agree to commence his federal sentence during his state term in order to run the sentences concurrently. Because petitioner can only speculate that those events would occur, he cannot meet his burden to show prejudice. *Olano*, 507 U.S. at 734-735.

4. Petitioner also suggests (Pet. 19-22) that there is a conflict warranting review on the question that petitioner *did* preserve in this case, *i.e.*, whether Sentencing Guidelines § 5G1.3 governs a district court's decision to impose a consecutive or concurrent sentence when the second sentence has not yet been imposed. That contention lacks merit. The sole published decision on which

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[7] The minimum prison term before parole eligibility for a "dangerous felony" generally is 85% of the sentence imposed by the court, with a life sentence deemed to be 30 years for those purposes. Mo. Ann. Stat. § 558.019(3) and (4)(1) (West Supp. 2009); see Mo. Ann. Stat. § 556.061(8) (West Supp. 2009) (definition of "dangerous felony"). Computing 85% of petitioner's life sentences for assaulting Trooper Brashear and his 15-year sentence for assaulting Scott yields 25.5 years and 12.75 years, respectively, which total 38.25 years.

petitioner relies, *McDaniel*, *supra*, simply reversed a district court's ruling that it lacked authority to direct that a federal sentence run concurrently with a not-yet-imposed state sentence. The Eleventh Circuit, relying on circuit precedent, held that the district court did have such authority and remanded for the exercise of that authority. The court of appeals did not affirm that Section 5G1.3 would apply on remand. 338 F.3d at 1288. Indeed, in the precedent relied upon in *McDaniel*, the Eleventh Circuit held that although the "catchall" provision of Section 5G1.3(c) was "the most analogous guideline" and that provision "recommend[ed] a consecutive sentence," the Guidelines ultimately "do not address * * * [the situation] of a federal defendant being sentenced while in state custody and awaiting trial and potential sentencing on a state charge." *Ballard*, 6 F.3d at 1505-1506 & n.8.[8]

Furthermore, even a holding that Section 5G1.3 applies before a state sentence is imposed would not entitle petitioner to reversal. The district court *departed upward* from the otherwise-applicable Guidelines range to give the statutory maximum sentence, and the court added that if further departures would have affected the sentence, it would have also departed upward in calculating petitioner's criminal history category to better reflect his criminality and dangerousness. Pet. App. 10a. Accordingly, even if the district court had not concluded that there was no relevant overlap between peti-

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[8] Even if there were a genuine circuit conflict over the applicability of Section 5G1.3, this Court's review would not be warranted merely to clarify the interpretation of the advisory Sentencing Guidelines. See *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991).

tioner's federal and state convictions[9]—a wholly fact-bound issue that does not warrant this Court's review—there is every reason to believe that the court would have imposed a consecutive sentence nonetheless. See *Ballard*, 6 F.3d at 1505 n.5 ("Had the Sentencing Guidelines explicitly addressed Ballard's situation by dictating that the sentence should be either consecutive or concurrent, we have recognized that the sentencing judge still has discretion under section 3584(a) to give either sentence appropriate for the defendant, provided that the judge follows the procedures for departing from the Sentencing Guidelines.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2009

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[9] Before sentencing, at petitioner's urging, the district court had ordered the Guidelines range recalculated to remove the treatment of the assault on Trooper Brashear as relevant conduct. Including all of that incident as relevant conduct would have yielded a Guidelines range of 360 months to life. PSR ¶ 62.

(4)

No. 08-1453

Supreme Court, U.S.
FILED
SEP 29 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

TOMMY RAY ROLLINS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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In the decision below, the Eighth Circuit embraced a startling rule for cases in which a dually-prosecuted defendant is sentenced first in federal court: district courts not only have authority to impose anticipatory consecutive sentences, but they may do so without regard for rules that ordinarily would "safeguard[] * * * against having the length of [a] sentence multiplied by duplicative consideration of the same criminal conduct," *Witte* v. *United States*, 515 U.S. 389, 405 (1995) (describing Guideline § 5G1.3).

Accordingly, defendants tried in the Eighth and Fifth Circuits face consecutive sentences in cases where five other courts of appeals would reject such sentences as unlawful, Pet. 14-16, and where two other circuits would require a *concurrent* sentence, Pet. 19-21. Moreover, the court arrived at this rule by construing the language "subject to an undischarged term of imprisonment" in opposite ways in the statute and in the sentencing guideline that implements it. Pet. 31-32.

The government makes no effort to defend this strange and highly inequitable rule. In fact, its brief in opposition expounds on the rule's error. Opp. 10-11. Nor does the government dispute that the courts of appeals have long been widely and sharply divided on the questions presented. See Opp. 11-12.

Rather, the government confines its opposition to claims (1) that the issues dividing the lower courts are less practically important than they appear; (2) that the courts of appeals could resolve their conflicts without this Court's intervention; and (3) that this case is not an appropriate vehicle for settling these conflicts.

Each of these assertions fails on its own terms and all raise a more basic question: What interest is served by leaving undisturbed a regime where federal courts continue to impose—and affirm—non-uniform and, by the government's admission, illegal federal sentences?

I. This Court Is The Proper Authority To Ensure Uniform Adoption Of The Correct Interpretation Of Federal Law

A. The Limited Potential For Ad Hoc Mitigation By Other Actors Does Not Diminish The Importance of These Issues

The government's assertion that the questions are not "important" enough to warrant certiorari is exceedingly strange. Whatever the government (now) says about petitioner's case, see *infra*, it is plain that the Eighth and Fifth Circuits authorize consecutive sentences in cases where other courts of appeals will not and still other circuits would require concurrent sentences; that the Bureau of Prisons ("BOP") gives binding effect to these (admittedly unlawful) pronouncements, see Opp. 10; and that dually-prosecuted defendants in the Eighth Circuit are subject to essentially opposite sentencing rules depending on whether the federal court sentences first or second. These differing rules produce dramatic practical consequences for individual defendants. See *Oregon* v. *Ice*, 129 S.Ct. 711, 721 (2009) (Scalia, J., dissenting).

The government denies none of this, but reprises its familiar claim that anticipatory consecutive sentences are not "practical[ly]" important, Opp. 13, because (a) state courts "generally" have authority to and "often" do "adjust

sentences," Opp. 13-14, and (b) BOP likewise has "discretion" to take corrective action "under certain circumstances," Opp. 14.

But as this qualifying language signals, there are many cases where no such corrective is available. State courts have no power to shorten mandatory minimums, see, *e.g.*, *United States* v. *Ballard*, 6 F.3d 1502, 1504 n.1 (11th Cir. 1993), and, as the government acknowledges, BOP takes the position that when an anticipatory consecutive sentence is specified on the face of the criminal judgment it will not even consider a concurrent one. Opp. 10.

Moreover, the government's wholly unsubstantiated claim that ad hoc neutralization "often" occurs in state courts, Opp. 13, is undermined by its concession that there remains widespread uncertainty whether such countermeasures are even legally *permissible* or whether, as Eighth and Tenth Circuit opinions have indicated, evasive actions violate the principle that federal law binds state courts, Opp. 15-16. As for BOP, in the limited circumstances where it will even consider the issue, it does so under standards, focused on discerning the sentencing judge's intention, that would support implementing, rather than correcting, an illegal anticipatory sentence. Opp. 14-15.

Practical efficacy aside, the government's second-best solutions raise troubling questions of principle. Relying on state courts to correct federal courts' errors of federal law "blur[s] * * * the distinct responsibilities of the State and National Governments," *Alden* v. *Maine*, 527 U.S. 706, 751 (1999), in ways irreconcilable with premises of dual sovereignty. And it is no less worrying to rely upon Executive Branch agencies to review and correct legal errors made by federal judges.

B. This Court Is Best Suited To Secure Uniform And Correct Application Of Federal Law

Equally startling is the government's view that the lower federal courts are better suited than this Court to resolve these issues. As the brief in opposition acknowledges, those same courts have long been—and remain—sharply divided on these issues. In addition to the much-discussed division over the meaning of each sentence in section 3584(a), the courts of appeals have fractured as to (1) the rules that govern the availability of concurrent sentences, see Pet. 19-20; (2) the preemptive effect, if any, of an anticipatory federal sentence, see Pet. 29 n.8; and (3) whether different rules govern cases where the "anticipated but not-yet-imposed sentence is a federal sentence [rather than a state one]." *United States* v. *Quintana-Gomez*, 521 F.3d 495, 497 (5th Cir. 2008).

Accordingly, the government would require independent action by (at least) four courts of appeals, each of which would have to decide first to reconsider the issue en banc and then to overrule existing circuit precedent. The government's best evidence of progress in this direction—that it is "aware of no case since [mid-April 2009] * * * in which * * * [a] court of appeals[] has denied a petition for rehearing en banc on this issue," Opp. 18—is underwhelming. A grant, not an absence of denials, is necessary and no court has *granted* en banc review since then. Indeed, the only material intervening development is the Eighth Circuit's *dismissal* of en banc review in *United States* v. *Lowe*. See Opp. 16. Indeed, no court has switched positions in the 18 years since the circuits first split.

Nor should one assume that the government's change in position, in particular the January 2009

directive from the Executive Office for United States Attorneys announcing that the Department of Justice has "adopted [a new] interpretation," Opp. 17-18, will induce multiple courts of appeals to reverse course. As the government candidly acknowledges, Opp. 18, this new policy has *not* prevented some district courts from imposing sentences the government agrees are illegal—nor has it dissuaded the Fifth Circuit, historically the court with the largest number of such sentences, from affirming them on appeal. Opp. 18.

Indeed, the government surely oversells the catalytic potential of its reversal. While claiming to have "encouraged * * * re-examination in the courts of appeals," Opp. 16, the government has, since the issuance of the guidance, *opposed en banc* reconsideration of the issue in both the Fifth and Eighth Circuits, see Opp. 16-17; and the directive that anticipatory consecutive sentences no longer be defended, Opp. 18, does not apply "*where circuit precedent* * * * dictates otherwise" or the government can argue forfeiture below or some other vehicle defect, Opp. 18 (emphasis added).[1]

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[1] Notably, while the case was pending, the government never notified the court of appeals that it had reversed its position.

II. This Case Is An Appropriate Vehicle To Resolve These Issues

The government proffers an assortment of reasons why this case is not an appropriate vehicle: that petitioner inadequately preserved the questions in the courts below, Opp. 9, 18; that petitioner's "substantial rights" are not at issue because his state sentence will be served first, Opp. 9, 19, 20; and that the first question presented is not "implicated" in petitioner's case, because BOP (now) says it will not treat the district court's decision as a binding directive that his sentences be served consecutively, Opp. 9-10. Indeed, the government has worked so creatively to develop these claims that its reinterpretation of the district court proceedings bears no resemblance to the account it presented below. The government is wrong at every turn and the larger point remains: none of these supposed "defects" affects this Court's ability—let alone power—to decide the legal questions presented.

A. The Questions Presented Are Properly Before The Court

There is no merit to the government's argument that review should be denied because of petitioner's "failure" to preserve the questions below. In fact, the government's attention-grabbing claim that the questions presented are being "raised for the first time" in this Court, Opp. 19, depends entirely on its view that petitioner's appeal required the Eighth Circuit to review only the district court's refusal to make his sentence concurrent and did not raise the "entirely distinct," Opp. 18, issue of its authority to impose a consecutive sentence.

Of course, the question of the existence of authority is always "implicated," Opp. 8, when its

purported exercise is challenged, see, *e.g.*, *Missouri* v. *Jenkins*, 515 U.S. 70, 84 (1995), and distinctions between the two sorts of challenges are notoriously gossamer, see *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in judgment) ("[T]here is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. * * * Virtually any * * * action can be characterized as either the one or the other."). And the government's brief below took an entirely different, less narrow, view of petitioner's claim, describing the issue presented as "[w]hether the district court abused its discretion in ordering Rollins' federal sentence to run consecutively to a state court sentence that had not yet been imposed." Gov't C.A. Br. 2. Far from emphasizing a "distinct[ion]" between the existence and exercise of authority, the government urged that "[t]he authority to impose * * * a federal sentence to be served consecutively to a yet-to-be-imposed state sentence falls within the broad discretion granted to the court." *Id.* at 25-26.

But none of this even matters. It is settled law that issues actually passed upon by the lower court may properly be presented to this Court. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41-46 (1992); Eugene Gressman et al., *Supreme Court Practice* § 6.26(b), at 464 (9th ed. 2007). The Eighth Circuit's decision expressly decided both questions presented, see Pet. App. 5a ("[T]he district court had discretion to impose a federal sentence to be served consecutively to a yet-to-be-imposed state sentence."); Pet. App. 4a–5a (holding that Guideline rules governing concurrent sentencing did not apply).

If any argument is made for the first time before this Court it is the government's contention that the more demanding plain error standard should govern. The government's appellate brief argued that the authority issue was presented and it expressly stated that the ordinary "reasonableness" standard of review, not Rule 52's plain-error standard, should govern, Gov't C.A. Br. 21, a suggestion the appeals court accepted. Under these circumstances, the attempt to raise a "plain error" roadblock cannot succeed. As the government has recently explained, that standard is inoperative in cases where "the [court of appeals] decided [an issue] [under its ordinary] standard * * * and * * * the government waived any forfeiture argument by failing to assert it on appeal." Opp., at 13-14 n.2, *McSwain* v. *United States*, No. 08-9560 (filed Aug. 5, 2009).

The government's forfeiture aside, petitioner takes exception to the revisionist account of the district court proceedings, particularly the suggestion that he "affirmatively urged the district court to use the authority that he now claims it lacks." Opp. 9. Petitioner actively undertook to dissuade the district court from imposing an anticipatory sentence, see Tr. 9-14, in the only way he could under circuit precedent. Cf. *Johnson* v. *United States*, 520 U.S. 461, 467-468 (1997) (rejecting reading of plain error rule that "would result in counsel[] inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent"). When the court decided that it would not await the state sentence and would decide the consecutiveness/concurrency question, petitioner understandably (and correctly) urged that a concurrent sentence was appropriate. The government, in contrast "affirmatively" asked the district court to

impose, and the court of appeals to affirm, an anticipatory consecutive sentence.

The government offers no reason why this Court should now consider questionable waiver arguments it failed to raise below. Nor does it suggest that this Court's consideration would be any different (or this case would be a better "vehicle") had the purely legal issue been briefed more extensively below.

B. The Questions Presented Directly Affect Petitioner

The government's other effort to leverage its reinterpretation of the district court proceedings into a vehicle defect fares no better. Relying on the fact that the district court judgment did not specifically mention the words "consecutive sentence," the government now represents that (1) contrary to its claims below, it does not regard the district court's decision as compelling a consecutive sentence, and (2) BOP will not treat the district court's statements as the equivalent of a binding order. The government then argues that the questions presented are no longer implicated here.

Not so. Although petitioner accepts the government's new position, there is less to the government's carefully limited concession than meets the eye. Thus, while the Solicitor General relays BOP's position that it would not treat those district court statements that led the government to characterize petitioner's sentence as consecutive as a binding "order" and states that petitioner is therefore "not foreclosed from seeking a concurrent designation," Opp. 10, she nowhere represents that BOP will not treat those same statements as indicia of intent to which "considerable (though not dispositive) weight" is given, Opp. 15.

C. The Length Of Petitioner's State Court Sentence Should Make No Difference To This Court's Review

The government's suggestion, Opp. 19-20, that the Court should decide these issues only when the defendant's federal sentence is more imminent than petitioner's typifies the shortcomings of its indiscriminate "vehicle" objections. The government has elsewhere urged denial on the opposite ground that the defendant's sentence was too short. See Opp. at 10-11, *Martinez-Guerrero* v. *United States*, No. 07-1362 (Aug. 27, 2008). To petitioner's knowledge, it has never identified a case where the length was "just right." Except in cases raising real Article III mootness concerns, the length of the state sentence should have no bearing on the Court's consideration of the legal issues. That said, the government cites no support for the assertion that an illegal sentence that adds ten years to a defendant's imprisonment does not affect his "substantial rights." Indeed, the claim that Rollins's federal sentence is of only academic significance is contradicted by the government's determined efforts below. Fully aware that he had been convicted in state court and would serve that sentence first, the government labored to persuade the district court to impose a sentence that was lengthy, anticipatory, and consecutive.

III. The Second Question Presented Warrants Review

The government says little about the second question the petition raises—whether the availability of a concurrent sentence should be determined by the timing of the state court's announcement—save to brush it aside as a "mere[]" guidelines question, Opp. 21 n.8, and quibble whether the published opinions of the Tenth and Eleventh Circuits make their disagreement with the Eighth Circuit as clear as their unpublished ones do. The government does not deny, however, that the question is squarely raised here; nor does it defend either the legal reasoning of the decision below or the sentencing regime it sanctions. As this Court has recognized, the principle the Eighth Circuit jettisoned, that "the length of [a] sentence [not be] multiplied by duplicative consideration of the same criminal conduct," *Witte* v. *United States*, 515 U.S. 389, 405 (1995), though embodied in a guideline, implements central statutory and constitutional objectives. The issue warrants review precisely because four circuits continue to impose anticipatory sentences and the two that do so most frequently have, in published opinions, embraced this doubly wrong, worst-of-both-worlds rule.

The government's offhand assertion, Opp. 22, that "there is every reason to believe that the [district] court would have imposed a consecutive sentence" is simply incorrect. As the petition made clear, the district court's sentencing decision rested squarely on its erroneous "supposition" that the state court would impose no additional (consecutive) punishment for the state convictions that overlapped with petitioner's federal weapons offense. That the district court was prepared to depart upward in order

that petitioner would receive the statutory maximum, Opp. 21, is in no way equivalent to a determination that the conduct warranted ten years' imprisonment *in addition to* the 15 years the state court unexpectedly imposed. Such a sentence would not only be unsupported by the Guidelines, but also contrary to Eighth Circuit law and Congress's directive.

IV. This Court Should Exercise Its Jurisdiction To Promote Uniform and Correct Application Of Federal Law

It is the office of this Court to say what federal law requires, especially in cases where courts of appeals have reached conflicting results and district courts are imposing concededly illegal sentences. Petitioner therefore respectfully requests that the Court grant this petition and either set the case for plenary consideration or reverse the judgment below summarily. Alternatively, the Court should vacate and remand to the Eighth Circuit in light of the government's change of position. See *Stutson* v. *United States*, 516 U.S. 193, 196-197 (1996); *Lawrence* v. *Chater*, 516 U.S. 163, 171-173 (1996). Finally, petitioner recognizes that other petitions pending before the Court raise similar issues. See Opp. 13 n.6. In the event the Court grants review in one of those, he requests that this case be consolidated with or held pending disposition of the related case.

CONCLUSION

The petition for a writ of certiorari or alternative relief should be granted.

Respectfully submitted.

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SEPTEMBER 2009